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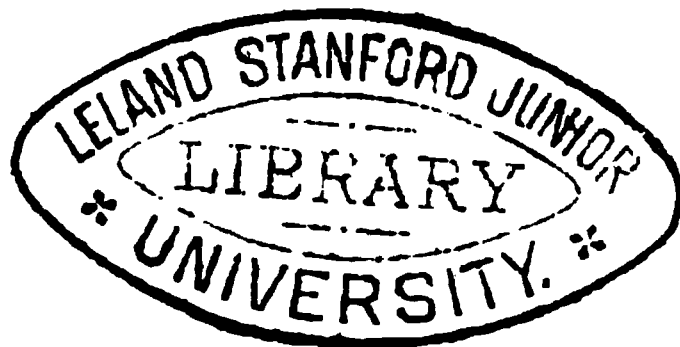
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A COLLECTION OF ALL
CASES AFFECTING RAILROADS OF EVERY KIND DECIDED BY
THE COURTS OF APPELLATE JURISDICTION
IN THE
UNITED STATES, ENGLAND AND CANADA

EDITED BY
THOMAS J. MICHIE

VOLUME IV
NEW SERIES

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THE
AMERICAN AND ENGLISH
RAILROAD CASES

NEW SERIES.

VOL. IV.

OMAHA STREET RY. CO.

v.

MARTIN.

(Supreme Court of Nebraska, April 10, 1896.)

Burden of Proof in Case of Negligence.—In an action, the basis of which is negligence, if the plaintiff can prove his case without disclosing any negligence on his part, his negligence then becomes a matter of defense, the burden of proving it being on the defendant.

When Negligence is a Question of Law and when of Fact.—When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law for the court.

Negligence in Attempting to Board Moving Street Car.—Whether the act of a party in attempting to board a moving street car is negligence or not, is generally a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case.

Evidence of Negligence.—It is for the court to say what act or omission is evidence of negligence, but generally it is for the jury to say whether the evidence establishes negligence.

Rule where both Parties are Negligent.—The law requires every reasonable man to exercise caution commensurate with the obvious peril with which he is confronted, but this means no more than that he is, under all circumstances, required to exercise ordinary care. Although a party may have negligently exposed himself to an injury, yet if the defendant,

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after discovering his exposed situation, negligently injures him, or is guilty of negligence in not discovering his dangerous position until too late, and the plaintiff is, because thereof, injured, he may nevertheless recover.

ERROR to Douglas county district court. *Affirmed.*

John L. Webster, for plaintiff in error.

Geo. W. Cooper, for defendant in error.

RAGAN, C.—Walter I. Martin sued the Omaha Street-Railway Company, in the district court of Douglas county, for damages which he alleged he had sustained, by reason of the negligence of the employes of that company, while attempting to board one of its cars. Martin had a verdict and judgment, and the street-railway company prosecutes to this court a petition in error.

1. Martin, in his petition, alleged that the servants of the railway company negligently failed to stop its train of cars at the usual stopping place a reasonable and sufficient length of time to permit him to safely get on the cars, “and, just as plaintiff was in the act of ascending the steps of the * * * back car of said train, defendant’s * * * servants * * * then in charge of * * * said cars * * * did so negligently and carelessly manage said train of cars * * * that said cars were suddenly and rapidly, and without notice or warning to plaintiff, started forward, * * * thereby violently throwing plaintiff to and upon the surface of the street, and under said moving car.” The street-railway company, in its answer, among other things, alleged “that said plaintiff negligently and carelessly endeavored to board said train while it was in motion, instead of waiting for the same to come to a stop; * * * that said plaintiff, in so endeavoring to board said train while in motion, slipped and fell, and so was injured.” On the trial, Martin himself testified as follows: “I took up my grip when I went to signal the car,—the motorman in charge of the car. I came over to the track, and, when the front car got along, it was going a little too fast to board, and I stepped out, and when the rear car came—the front end of the rear car came along—the car almost stopped, just about stopped; and I took hold of the hand rail, and put my foot on the step, and was raising myself up to put my right foot up the next step, and there was a sudden jerk, and it threw me on the street.” The conductor of the car by which Martin,

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in attempting to board it, was hurt, testified as follows: "Well, sir, I noticed the motorman applying his brake, and I looked over and saw a man standing there. So I applied my brake to let a man off the train. At that time it was going a little slow, because we were going down grade, any way; and the first thing I saw was when we got to about the corner,—I saw Mr. Martin. I saw a man with a package. * * * As we slowed up to let him on, the train came nearly to a perfect standstill. Mr. Martin,—I didn't know what his name was at that time,—he caught hold of the front end of the trailer with his right hand, and I saw then he couldn't get a good foothold with his left foot,—got a good foothold with his right foot; and I noticed that, and made a grab for him, and he slipped."

The first assignment of error argued in the brief is directed to the refusal of the district court to give certain instructions requested by the street-railway company, and it is insisted that the court erred in refusing to give these instructions, as they embodied the law of the case applicable to the testimony given in support of its theory of the accident. The instructions are as follows:

"(1) The jury are instructed that the plaintiff cannot recover in this action unless he satisfied you, by a preponderance of evidence, that the injuries received by him resulted from the negligence of the defendant company, and that the plaintiff was free from fault in the premises." The court did not err in refusing to give this instruction. It was not incumbent upon the plaintiff to prove, by a preponderance of the evidence, that his injury was not the result of negligence on his part. If Martin proved, by a preponderance of the evidence, that he was injured, and that his injury was the result of the negligence of the street-railway company, and in making these proofs it was not disclosed that his injury was the result of his negligence, he made out his case. He was not required to prove, by a preponderance of the evidence, the negative proposition that his injury was not the result of his negligence. See *Stock-Yards Co. v. Conoyer*, 41 Neb. 617, where the rule laid down in *Anderson v. Railroad Co.*, 35 Neb. 95, is quoted with approval, the rule being as follows: "In an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is

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proof in case
of negligence.

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a matter of defense, the burden of proving it being on the defendant."

The second instruction is as follows: "The jury are instructed that if you find from all the evidence that the accident to the plaintiff was caused or brought about by his attempt to get on board the train while the train was being brought to a stop, but before the train had come to a full stop, then he was guilty of contributory negligence, and cannot recover, and your verdict should be for the defendant." This instruction the court did not err in refusing to

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in attempting
to board
moving street
car.**

give. It was not for the court to say whether or not Martin was guilty of negligence in attempting to board this train while it was moving. The court might have properly told the jury that, if Martin attempted to step on the train while it was in motion, that was evidence tending to prove negligence; but it was for the jury to say what the effect of that evidence was. *Railroad Co. v. Craig*, 39 Neb. 602, was an action for damages, brought by Miss Craig against the railway company for injury which she alleged she had sustained through the negligence of that company in not bringing the car to a standstill when she was about to alight therefrom. The railway company's theory of the accident was—and its evidence tended to support it—that Miss Craig's injury was caused by her stepping from the car, while it was in motion, to the platform or foot-board thereof, and not holding to the uprights at the ends of the seats. The eminent counsel who makes the argument for the street-railway company in the case at bar, in the *Craig* Case pressed this court to decide, as a matter of law, that if Miss Craig stepped from the car while in motion, and was thereby injured, this act raised against her a conclusive presumption of negligence. Answering that argument, the court said: "But we think that Miss Craig's stepping out on the platform of the car before it came to a full stop, at the time and under the circumstances, and her failure to avail herself of the hand holds on the uprights of the seats, were, at most, facts to be submitted to the jury as evidence tending to show negligence on her part. Reasonable men might honestly draw different conclusions as to whether this act or omission of Miss Craig's was, under the circumstances, negligence; and therefore it was for the jury to say whether the evidence of what she did, and

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gence is a
question of
law and when
of fact.**

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what she omitted to do, warranted a conclusion of negligence on her part. It is for the court to say what act or omission is evidence of negligence, but it is for the jury to say whether the evidence establishes negligence." Evidence of negligence.

The third instruction refused was as follows: "The jury are instructed that it was the duty of the plaintiff to wait until the train had come to a stop, before attempting to get on board the car; and if you find from the evidence that the train was being brought to a stop, but before the train had come to a full stop the plaintiff attempted to get on the car, and, in so doing, slipped and fell, then the plaintiff cannot recover, and your verdict should be for the defendant." What has just been said in reference to instruction No. 2 disposes of the assignment that the court erred in refusing to give this instruction.

The fourth instruction refused was as follows: "The jury are further instructed that, in determining whether the plaintiff attempted to get on board the train before the train had come to a full stop, you should take into account, not only the evidence of the defendant's witnesses, but also such witnesses as were called by the plaintiff, if any, who testified that the train had not come to a full stop when the plaintiff attempted to get on board." This was, in effect, asking the court to say to the jury: "One of the matters being litigated here is whether Martin attempted to board the train while it was in motion. The defendant's witnesses, and some of Martin's witnesses, have testified that he did. You should consider the evidence of all these witnesses." It was the duty of the jury to consider all the evidence of all the witnesses. The jury was sworn to try the case according to the evidence, and we will not presume they did not; but we do not think the district court was under any obligation—if, indeed, such a course would have been proper—to single out one point being litigated, and say to the jury, "All the witnesses on one side of the case have testified that a certain thing was done, and part of the witnesses on the other side have testified that this thing was done, and you should consider the evidence of these witnesses." This would have been not only to give too much prominence to one point being litigated, but to tell the jury to consider only the evidence directed to one side of the matter in dispute.

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The fifth instruction refused, of which complaint is made, was as follows: "The jury are further instructed that the fact that the plaintiff was carrying a package, as described by himself and other witnesses, was a circumstance requiring upon his part a higher degree of care, while attempting to get on board the train, than if he had not been burdened or incumbered by such package." The plaintiff was required to exercise ordinary care, and nothing more. The law requires every reasonable man to exercise caution commensurate with the obvious peril with which he is confronted; but this means no more than that he is, under all circumstances, required to exercise ordinary care, the danger and his knowledge thereof considered. *City of Beatrice v. Reid*, 41 Neb. 214.

2. It is next argued that the court erred in giving to the jury instruction No. 8, as follows: "You are further instructed that if you find that plaintiff attempted to board the train while carrying a bundle in one hand, and after it had passed over the street intersection, and while the train was in motion, and at the point where it was the duty of defendant's employes to bring the train to a stop, as hereinbefore explained to you, and you further find that plaintiff received the injury complained of by reason of his attempting to board the train while in motion, such act on the part of plaintiff would constitute contributory negligence on his part, as it was his duty not to attempt to board the train while it was in motion, carrying in one of his hands a bundle, and he could not recover in this action, unless you further find that an ordinarily cautious and prudent man, situated as plaintiff was, would, under like circumstances, have attempted to board the car, or that defendant's employes, by the exercise of ordinary care, could have avoided the injury after discovering the danger, if you find they did or could have discovered the danger by the exercise of ordinary care. In determining whether defendant's employes exercised ordinary care to avoid the injury after discovering the danger, should you find that they did discover the danger, and should you find that plaintiff, by his own negligence, contributed to the accident which produced the injury complained of, you will take into account, and give due consideration to, the fact (if you find such fact has been proven) that the conductor and motorman used every effort and all the means within their power to stop the train and avoid the injury to plaintiff, by applying the brakes,

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making an effort to catch the plaintiff to prevent his falling (if such facts have been proven), the position the train was in, with reference to grade and speed, and all other facts you find disclosed by the testimony bearing upon that question." We think this instruction was erroneous, but the street-railway company cannot complain of it. It was not prejudicial to it, but to Martin. One criticism of counsel is directed to that part of the instruction quoted in which the court told the jury, in effect, that, if they should find that Martin had negligently exposed himself to danger, yet he might recover, if the railway company, after discovering his danger, inflicted the injury upon him because of its failure to exercise ordinary care. This instruction was correct. See *Railway Co. v. Mertes*, 35 Neb. 204; *Railroad Co. v. Grablin*, 38 Neb. 90; *Shear. & R. Neg.*, § 25. But counsel says that the instruction was erroneous because not applicable to the facts in evidence in the case: First, because the evidence did not show that Martin had placed himself in a position of danger. The evidence introduced in behalf of the railway company all tended to show that Martin attempted to board this train while it was in motion; and we think it matter of common sense that a person, when about to step on or off a moving train, is in a situation of danger. The second argument is that the instruction was not applicable because the evidence does not disclose that the railway company knew that the plaintiff, Martin, was in danger. We have already quoted the evidence of the conductor of the train, to the effect that Martin attempted to step on the train while it was in motion, and that he (the conductor) saw that he was about to fall, and that he attempted to catch him. Another criticism made to this instruction is to that part of it by which the court told the jury that the railway company would be laible for Martin's injury if, after discovering his danger, it failed to exercise ordinary care, or if it did not discover his danger because of its failure to exercise ordinary care. In other words, the argument is that the railway company was only bound to exercise ordinary care after it discovered Martin's danger, and that its employes were under no obligation to observe Martin or his conduct until they found him in a dangerous situation. Under the circumstances in evidence in this case, we do not think the court erred in telling the jury that the railway company would

Rule where
both parties
are negligent.

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be liable for Martin's injury if it failed to exercise ordinary care after discovering his dangerous situation, or if, through its want of ordinary care, it failed to discover his dangerous situation until too late. The evidence is undisputed that Martin signaled the train to stop; that the conductor and the motorman saw him, and slowed the train down, and that he had a grip in his hand; and that he was intending and attempting to board the train. Under these circumstances, it was incumbent upon the employes of the railway company to know that Martin was on the train before they started it. Railroad Co. v. Grablin, 38 Neb. 90, was an action by Grablin, as administrator, against the railroad company, for negligently, as he alleged, causing the death of his child while trespassing on the railway company's track. The railway company requested the trial court to instruct the jury as follows: "You are instructed, * * * if you find that the negligence of the boy in going upon the track caused or contributed to the injury, you must find a verdict for the defendant, unless you further find that the company or its servants were willfully or recklessly negligent after the boy was discovered, or that the engineer willfully avoided seeing the boy on the track sooner than he did see him." The refusal of the district court to give this instruction was assigned here as error, but the court sustained the action of the trial judge, and held that if the engineer could, by exercising such vigilant and careful lookout as was consistent with his other duties as engineer, have seen the boy in time to save him, then his neglect to exercise such careful and vigilant lookout was negligence.

These are the only assignments of error which we deem it necessary to notice. The judgment of the district court in all things right, and is affirmed. Affirmed.

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OMAHA & R. V. RY. CO.

v.

WRIGHT *et al.*

(*Supreme Court of Nebraska, April 7, 1896.*)

Allegation of Negligence.—An allegation of negligence in a pleading is, like one of fraud, a mere conclusion. The facts from which the inference of negligence arises must be pleaded.

Issue Not Raised by Pleading.—It is error to submit to the jury an issue of negligence not raised by a pleading of specific facts.

Duty of Engineer to Exercise Lookout.—It is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions on the track, and if such a precaution would have revealed the presence of stock in time to have avoided their injury by the use of ordinary care, the railroad company is liable for injuries inflicted upon them, although they were not actually seen until too late to avoid striking them, and although they were not without the protection of the statute requiring tracks to be fenced.

ERROR to Saunders county district court. *Reversed.*

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.

R. S. Norval, for defendants in error.

IRVINE, C.—The defendants in error brought this action against the railway company to recover damages on account of cattle belonging to them, killed and injured by a train of the railway company. The petition, while it is in one count, really alleges or attempts to allege three grounds of recovery: First, that a gate on one of the fences along the right of way was insufficient, and negligently permitted to be out of repair, and that, by reason of those facts, the cattle got upon the right of way; second, that after they got upon the right of way, their injury resulted from the careless operation of the train; third, that the railway company, after the stock was injured, took possession of the dead bodies and the injured cattle, and refused to permit the owner to retake them,—that is, a charge of conversion. The answer of the railway com-

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pany was a series of denials,—some of them negatives pregnant but the whole effect practically that of a general denial,—coupled with some affirmative allegations in regard to the security of the gate and negligence on the part of the plaintiffs. From a verdict and judgment in favor of the plaintiffs for \$569, the defendant prosecutes error.

Many assignments of error relate to rulings on the admission of evidence, and to the refusal of instructions with regard to the character of the gate, and the duty and liability of the railway company concerning the gate, and flowing from its condition. The railway company is not, however, in any position to complain of these rulings. The statutes on the subject are found in Comp. St., c. 72, art. 1, §§ 1, 2. The court, after stating the issues, stated to the jury the substance of the statute, and then charged the jury that the duty as imposed by statute of erecting and maintaining gates, openings, or bars at private crossings, only with regard to adjoining proprietors, and that, if the cattle were upon the premises of an adjoining proprietor, without his consent, and escaped therefrom upon the right of way without negligence of the defendant, and were killed without its negligence, there could be no recovery. The evidence was uncontradicted that the cattle of the plaintiffs, about 340 in number, were in a corral north of the railway and west of the land of one Wallen, that they escaped from the corral upon the land of Wallen, and thence came through the gate in question upon the right of way. There was no evidence of any act of the railway company leading to their escape. Therefore, the effect of this instruction was to absolutely prevent a recovery on the ground of a violation of the fencing law. Whether or not the court correctly interpreted the statute we need not and cannot here consider, because the construction given it was so favorable to the railway company that, under the evidence, all question of liability thereunder was eliminated from the case. Nor need we extensively consider any questions raised by the pleadings and proof as to the defendant's taking possession of the dead and injured cattle, and converting them to its own use. On the trial of the case this issue was evidently a minor consideration.

We think there was error on another feature of the case, and the verdict not being of such a character that, on this issue, it was the only one which could properly be rendered,

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if not in direction, at least in amount, we pass over such assignments as relate exclusively to it.

It is quite clear, under the instructions of the court, that the verdict turned upon the negligence of the railway company in operating its train, whereby the cattle were killed and injured after they came upon the right of way. On this branch of the case, the allegations of the petition are that the defendant, "by its agents and employés, while running at a high rate of speed, carelessly and negligently, and without using due caution, ran the engine and train of cars connected therewith and attached thereto over and upon the cattle of these plaintiffs; * * * that the said defendant carelessly and negligently, by its employés and servants, in operating said train, ran their said engine and train in, over, and upon said plaintiffs' stock, when, by exercising proper care and skill in the management and handling of its engine and train, it could have stopped said train long before striking said plaintiffs' stock." An allegation of negligence or want of care is like an allegation of fraud. It is a bare conclusion. A

pleading is not sufficient which merely in general terms charges a want of due care or negligence. **Allegation of negligence.**

It is necessary to plead the facts from which an inference of negligence arises. *Railroad Co. v. Grablin*, 38 Neb. 90; *Malm v. Thelin*, 47 Neb. —, 66 N. W. Rep. 650. The petition merely alleges that the defendant negligently ran over the stock, while by the use of proper care it might have stopped the train before striking the cattle. The evidence shows that there were about 340 cattle on the right of way. It tends to show that, while there was a curve in the road near the point where the cattle were struck, there were no cuts, grades, or other obstructions which would prevent a clear view of the track for a distance of half a mile. The accident occurred shortly after 7 o'clock in the morning of December 15th. Some of the witnesses testified that it was a clear morning, and quite light at that time. Others testified that it was misty and dark. The court submitted to the jury the question of the defendant's liability under instructions that, if the engineer saw the cattle, or by the exercise of due care should have seen them, in time to have stopped the train and avoided the accident, the company was liable for his not doing so. The railway company contends that the allegations of the petition were in

**Issue not
raised by
pleading.**

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these respects insufficient, and also that the duty of the railway company was only to exercise ordinary care to avoid injuring the cattle after those in charge of the train actually saw them.

On the first contention, we think the railway company was right; on the second, wrong. The second argument is based on those cases, respectable in number, if in nothing else, which hold that a railway company's duty to a trespasser is merely to avoid wantonly or recklessly injuring him after becoming aware of his presence. This is supported by the argument that the cattle were trespassers, and that the rules are the same as to liability for property unlawfully upon the track as for persons. We think the same general principle does apply. But the rule in this state is that it is the duty of the railway

company not merely to avoid injuring a trespasser after his presence has been discovered, but that those in charge of a train must exercise reasonable care to avoid injuring all such persons who are or who may be anticipated to be upon the track; and the company is liable if the engineer, by keeping such a lookout as is consistent with his other duties, would have observed the trespasser in time to avoid the injury. Railroad Co. *v.* Grablin, *supra*; Railroad Co. *v.* Wymore, 40 Neb. 645; Railroad Co. *v.* Wilgus, 40 Neb. 660. Therefore, we think that there was no error in the statement that if the engineer, in the exercise of ordinary care, would have seen the cattle in time to have prevented the injury, it was his duty to do so, and the company was liable for a failure in that regard. But, applying the rule already stated in regard to pleading, it is not alleged that the cattle were seen, or that, by the exercise of such reasonable care as was consistent with the duties of the engineer, they might have been seen. While, from the evidence, we think it is a fair inference that an immediate stop of the train would have been dictated by ordinary prudence on discovering 340 head of cattle on the right of way, the failure to slacken speed is the only fact alleged in connection with the charge of negligence. Whether or not it was the duty of the engineer to stop his train would depend upon other circumstances which are not pleaded. Trains must run, and run at considerable speed, even on misty mornings, before daylight, and no inference of negligence can certainly be drawn from the fact that a train was running at a high rate of

Duty of engineer to exercise lookout.

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speed, and might have been stopped before trespassing cattle are injured, when there is not a showing of facts raising a reasonable inference that it was the engineer's duty to stop, or to exercise some other precaution. If, as plaintiffs' evidence tends to show, it was a clear morning, daylight, the track unobstructed for half a mile, and 340 head of cattle on the right of way, and the engineer failed to see these cattle in time to stop, or, having seen them, to stop if he could, then the inference of negligence would be reasonable. But such facts, or similar facts, are not pleaded, and the proof cannot extend the scope of the pleadings. We think, therefore, while the instructions were correct as abstract statements of law, they submitted to the jury an issue not within the pleadings, and for that reason the judgment must be reversed, with directions to permit plaintiffs to amend their petition if they desire. Reversed and remanded.

SAUNDERS

v.

SOUTHERN PAC. CO.

(Supreme Court of Utah, April 3, 1896.)

Case at Bar.—The defendant entered into a contract with one N. to transport sheep, under which plaintiff accompanied them as an attendant. The cars in which the sheep were placed were provided with doors at either end, so that the attendants could pass from the caboose through the cars, and care for the sheep. On the way the conductor put on three refrigerator cars, between the sheep cars and the caboose; thus obliging the plaintiff, against his protests, to cross the refrigerator cars, on the running boards on top of these cars, which were higher than those containing the sheep. At a certain point on the road the train passed through a snowshed, which was built before the construction of the refrigerator cars, and was not high enough for a person to walk on top of the cars when passing through the shed. The conductor gave the plaintiff no warning of the shed, nor of the danger arising from walking on top of the refrigerator cars while passing through said shed. Plaintiff had been in the cars to care for the sheep, and was returning to the caboose, with his back to the engine, walking on one of the refrigerator cars, when he was struck by a crosspiece, and received the injury complained of. There was no whistle sounded or warning given when the train approached the snowshed. *Held*, error to grant a motion for a nonsuit.

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When Negligence is a Question of Law.—Negligence is never considered a question of law for the court, unless the facts shown by the evidence are such that all reasonable men must draw the same conclusion from a consideration of them, or are such as would warrant the court in setting aside the verdict of the jury if one were based on them.

Carrier may not Exempt Himself from Liability for Negligence.—Plaintiff was entitled to protection as a passenger on such train, and that regardless of any clause in the contract exempting the company from liability. Such clause is against the policy of the law.

Negligence *per se*.—The court inclines to the view that it was negligence *per se*, on the part of the defendant, not to maintain the shed high enough for a person to pass beneath it safely while walking on top of the refrigerator cars; but if, for any reason, it may be lawful to maintain the shed at an insufficient height, then the exercise of ordinary care requires the railroad company to give warning in some way—either by word, or other proper method—of the train's approaching the same, to all persons whose duties expose them to danger because of the structure.

Question of Contributory Negligence for Jury.—Whether or not the plaintiff was, under the peculiar facts and circumstances of this case, guilty of contributory negligence, was a question for the jury, and not one of law for the court.

Assumption of Risks.—Attendants on stock in transit on a railroad assume all ordinary risks incident to such service, and it is the duty of the railroad company to provide reasonably safe structures and facilities for such transportation.

APPEAL from Weber county district court. *Reversed.*

Evans & Rogers, for appellant.

Marshall & Royle, for respondent.

BARTCH, J.—The plaintiff brought this action to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant. At the trial of the cause, when the plaintiff rested his case, he was nonsuited, and thereafter a motion for a new trial was refused. Thereupon he appealed to this court, claiming that the trial court erred in granting the motion for a non-suit and dismissing the action, and in overruling and denying his motion for a new trial. The facts disclosed by the plaintiff's testimony, and admitted by the pleadings, are substantially as follows: The defendant, at the time the plaintiff received the injury complained of, operated a railroad between Ogden, Utah, and San Francisco, Cal. On the 1st day of January, 1892, at Iron Point, in Nevada, the defendant entered into a contract with one Thomas Nelson for the transportation of 11 cars of sheep over its railroad to San Francisco. The contract provided free passage on the stock train

Case stated.

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for the plaintiff, who as an attendant to care for the sheep, and that the defendant, by reason of such free passage, would not be liable for any negligence upon its part by which the plaintiff might be injured. Under this contract, Thomas and Charles Nelson, the owners, loaded the sheep into cars furnished by the company. Each car had doors, through which the attendants could pass, at either end, and at the rear of the cars for the sheep there was attached a caboose for the use of the attendants and trainmen; and these cars and caboose remained so connected for two days, until they arrived at Truckee. There the servants of the defendant, with the knowledge of the conductor of the train, although expressly objected to by the plaintiff and Nelson, switched three refrigerator cars into the train, between the caboose and sheep cars. These cars so placed in the train had no doors at the end, and were a foot to 18 inches higher than the cars containing the sheep, and had a running board on top. When sheep are being shipped in cars, they are liable to get killed by crowding on to each other and trampling each other down. To prevent this, it is the duty of the attendants to pass through the train and help them up. Before the train started from Truckee, the plaintiff, Nelson, and one Scott went forward through the cars, as was the custom, to lift up the sheep which had fallen down, and it pulled out while the men were thus engaged. Switching of the train prevented them from attending the sheep before starting. The train had not proceeded far to the westward, when, their work having been completed, the plaintiff and Nelson got upon the top of the cars to return to the caboose, because they could not pass through the refrigerator cars. Thus returning, with their backs towards the engine, and having reached the refrigerator cars next to the caboose, each one of them was struck in the back of the head by a crosspiece of the overhead portion of a snow shed, and Nelson was killed, and the plaintiff severely and permanently injured. Since the time of the construction of the snowshed in question, the defendant has been using freight, refrigerator, and furniture cars, which are higher than those in use at that time, but had not raised that snowshed, although the new ones built since were made higher. The one which caused the injury is situated on the side of a mountain which is not steep enough to indicate snowslides or avalanches, and there is nothing to interfere with building it

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higher, and the plaintiff had no notice of its insufficient height. It was customary for, and the defendant knowingly permitted, the attendants upon stock to return to the caboose, upon the running boards, while the train was in motion. On the occasion in question the weather was very cold and stormy, and there were no accommodations for the attendants on the stock, except in the caboose. The conductor of the train knew that the plaintiff and Nelson were attendants on the sheep, and that they were somewhere on the train, and, in order to reach the caboose, would be required to return over the tops of the cars, on account of the refrigerator cars which had been put next to the caboose. It was necessary for them to care for and help up the sheep, and then leave the car as soon as practicable, as their presence would disturb them and cause them to move together and tread upon each other. The plaintiff knew that there were snowsheds on the road west of Truckee, but not just where they were. He knew that they had passed through one snowshed, and expected to hear the whistle, as a signal, before entering another, as this was a requirement, under the rules of the defendant; but he heard none, and there was no warning whatever given of the obstructions of snowsheds. When the plaintiff and Nelson were struck, one Pascal called out to stop the train, and the train was stopped immediately.

Assuming these facts to be true, which is the rule for the purposes of a nonsuit, the question is, do they present such a case of negligence on the part of the defendant, and such a want of contributory negligence on the part of the plaintiff, as will render the defendant liable, and warrant a recovery? Would they, unexplained and uncontradicted by the defendant, support a verdict of a jury? Counsel for the appellant contend that the respondent was guilty of negligence in operating its cars through a snowshed of insufficient height to admit the passage of the appellant walking on the running board, in placing the refrigerator cars next to the caboose, and in failing to sound the whistle or give any warning before the train entered the snowshed. On the other hand, counsel for the respondent insist that it was an act of gross negligence on the part of the appellant to walk on top of the cars on the occasion in question, and that, therefore, he cannot recover.

In negligence there is no purpose to perpetrate a wrong upon another, not to omit to perform a duty towards another.

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There is, however, a want of proper skill or care or attention. Such is the general idea that where one person does or omits to do an act which causes injury to another, not intentionally, and there is an absence of proper skill or care or attention, such doing or omitting to do the act is characterized as negligence, and the author of the injury is liable therefor, in the absence of negligence on the part of the person injured. It has been defined as, in its civil relation, being such an inadvertent imperfection by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. Bouv. Law Dict. Legal duty is one of the essential elements in negligence, and, unless it exists in favor of the person injured, he can have no redress. Even though such duty is owed to the public in general, still, unless the injured person can show that for some reason it was specially owing to him, he can maintain no action in his private capacity. It is incumbent upon the plaintiff, in every action for negligence, to aver and prove facts sufficient to show that the defendant owes him a duty, and what it is. Such duty must be to use care, which includes skill and vigilance, and the degree of which must be such as a reasonable and prudent person would use under similar circumstances, or such as the existing circumstances demand. 1 Shear. & R. Neg., §§ 8, 9. Applying these principles to the case at bar, in order that the plaintiff may be entitled to recover,—there being no question made as to the pleadings,—his proof must show that the defendant on the occasion in question owed him a duty, and that, in the performance of which, it failed to exercise ordinary care, skill, or vigilance. That this was shown by the testimony of the plaintiff hardly admits of doubt or controversy, upon consideration of the facts above set out. It appears that the defendant is a common carrier, engaged in the transportation of passengers and freight. By contract, it engaged to carry the plaintiff as an attendant upon the stock in its cars. He thereby became a passenger, and entitled to protection as a passenger, on such a train; and this regardless of any clause in the contract exempting the carrier from liability for the negligence of agents and servants, because such clause was against the policy of the law, and therefore without effect. Such carriage was not gratuitous, because the contract was the moving, and a

Carrier may
not exempt
himself
from liability
for negligence.

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valuable, consideration. When the company had contracted to carry, and the conductor of the train had received him, it was liable for any injury which might befall him through the negligence of its agents and servants, the same as though he had actually paid his fare before entering its cars, and the defendant was bound to exercise the same care. Hutch. Carr., § 555b; Patt. Ry. Acc. Law, §§ 211, 212; Railroad Co. v. Horst, 93 U. S. 291; Railroad Co. v. Lockwood, 17 Wall, 357; Railroad Co. v. Curran, 19 Ohio St. 1; Railroad Co. v. Henderson, 51 Pa. St. 315; Erskine v. Loewenstein, 82 Mo. 301; Lawson v. Railroad Co., 64 Wis. 447, 21 Am. & Eng. R. Cas. 249. Being on the train, it was the plaintiff's duty to care for the sheep. After having attended to his duty in this regard, he was, of necessity, compelled to return to the caboose, because there was no place provided for him in the sheep cars to remain there, and to do so would disturb the sheep and produce the very effects which it was his duty to prevent. He could not return through the cars, on account of the refrigerator cars, through which he could not pass, having been placed next to the caboose, and therefore attempted to return over the top of them, as stockmen had been accustomed to do. The conductor knew he was somewhere on the train, and was compelled to go over the tops of the cars to get to the caboose, but gave him no warning of its approaching the snowshed, which was of insufficient height to permit him to pass through safely while walking on the running boards. Under these existing facts and circumstances, it is not absolutely necessary or material to decide

Negligence per se. whether or not it was negligence *per se*, on the part of the railroad company, to maintain the

snowshed in question at an insufficient height to allow a person to pass through safely while walking on top of the moving cars, although we are inclined to the affirmative of this view, as founded on both reason and justice. If, however, for any reason, an overhead structure, which exposes persons who are rightfully on a moving stock train, as was the plaintiff, to unusual risks, may be lawfully maintained at such height, then every principle of justice, as well as the exercise of ordinary care, requires that the company which maintains such structure shall give warning in some way—either by word, or other proper method—of the trains approaching the same, to all persons whose duties may expose them to the

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danger of being injured because of the structure. The giving of such warning is a duty which such company cannot fail to perform, and escape liability for injuries which result as a natural sequence, because of such failure, and in the performance of such duty it is bound to exercise due care. We are aware that some courts seem to maintain a contrary view, but we think the doctrine above stated is supported by the weight of authority, and it is beneficial to both the passenger and the company. It tends to protect the former, and warns the latter against the consequences which result from the absence of proper care and precaution. While such attendants on stock in transit on a railroad must assume all ordinary hazards incident to such service, still it is the duty of the company which transports the stock to provide reasonably safe structures and facilities for such transportation, and parties contracting with such carriers have the right to assume that such duty has been discharged. Beach, Contrib. Neg., § 134; Shear. & R. Neg., §§ 198, 200; Railroad Co. v. Horst, *supra*; Railway Co. v. Carpenter, 56 Fed. Rep. 451; Railway Co. v. Irwin, 37 Kan. 701; Railroad Co. v. Johnson, 116 Ill. 206; Railroad Co. v. Wright, 115 Ind. 378, 38 Am. & Eng. R. Cas. 41; Railroad Co. v. Welch, 52 Ill. 183; Railroad Co. v. Rowan, 104 Ind. 88; 23 Am. & Eng. R. Cas. 390.

Assumption of
risks.

- We conclude that the appellant was rightfully on the train, and had the right to assume that the snowshed was a safe structure, having received no notice to the contrary; that the respondent, on the occasion of the accident, was guilty of negligence, under the circumstances indicated by the proof; and that there was presented a question for the jury, and not one of law for the court. Whether or not the appellant, under the peculiar facts and circumstances of this case, was himself guilty of a want of ordinary care, which contributed to the injury, was also a question for the jury. The court was not warranted, under the circumstances shown by the record, to decide, as a matter of law, that the appellant was guilty of such contributory negligence as precluded a recovery, and therefore was not warranted in granting the nonsuit, or denying the motion for a new trial. Negligence is never considered as a question of law for the court, unless the facts shown by the evidence are such that all reasonable men must draw

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contributory
negligence for
jury.

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the same conclusion from a consideration of them, or are such
as would warrant the court in setting aside the
verdict of the jury if one were based on them.
For a further discussion of the subject of non-
suit, we refer to the case of *Lowe v. Salt Lake*
City (decided by this court at the present term), 44 Pac. Rep.
1050.

As a new trial must be granted, we do not consider it necessary to discuss any other questions presented in the record. The judgment is reversed, with costs, and the cause remanded, with directions to the court below to grant a new trial.

ZANE, C.J., concurs.

MINER, J. (dissenting).—I do not fully concur with the opinion and reasoning of the majority of this court in this case. The opinion is based upon the facts recited therein, and largely, though doubtless unintentionally, overlooks that part of the testimony showing negligence on the part of the plaintiff, upon which the nonsuit was evidently based. The contention of the appellant is based upon the alleged negligence of the respondent (1) in operating its cars through a snowshed which was of insufficient height to admit the passage of appellant, walking on the running board, when returning from attending to the sheep; (2) by switching in three refrigerator cars, which were 12 to 18 inches higher than the stock cars, containing no end doors, between the caboose and stock cars, thereby compelling appellant to walk over the tops of such cars while returning to the caboose; (3) in failing to sound the whistle, or to give any other warning, before the train entered the snowshed. The respondent, upon its part, claims that the injury complained of is traceable wholly to the gross negligence on the part of the appellant, as shown by the proof, and that the respondent was free from negligence which caused the injury. The trial court adopted the latter view, and granted the nonsuit.

In order to be advised more fully upon the question of negligence charged against the appellant, it is necessary to examine the facts presented in the opinion of this court in connection with the additional facts as shown by the abstract on file. It appears from the testimony of the plaintiff that he worked for the defendant company 10 or 11 months in 1888, as foreman of a freight train running from Wadsworth

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to Truckee, and had gone over the road west of Truckee twice on a passenger train, and knew there were snowsheds within a mile or two west of Truckee, and plenty of them between Truckee and Summit, which places were 12 miles apart. At the time of the accident, appellant had passed through one snowshed. It also appears that there were 19 stock cars, 3 freight cars, and a caboose, in the train going west. Eight loaded cattle cars were next to the engine, the 11 loaded sheep cars behind them, and next came the 3 refrigerator cars and the caboose. These refrigerator cars are not shown to have been loaded. When this train started from Truckee, Nelson, Spencer, and the appellant went through the sheep cars next to the engine, east, and passed through all the cars. Spencer, who was with them, commenced on the east end, and went through the cars, west. Nelson had been over the road many times, and knew the location of the snowsheds. Spencer remained in the sheep cars. There were doors at each end of the sheep cars for the attendants to pass through. The three refrigerator cars were placed between the sheep cars and the caboose at Truckee, before the train started. The appellant objected to these cars being placed next to the caboose. The refrigerator cars were about one foot higher than the other cars, and had no end doors, as the appellant well knew. Plaintiff testified, in substance, that he said to Nelson "that we had better get back to the caboose over the tops of the cars, because we can get back quicker." The emergency that called them back to the caboose was that it was getting cold, and that by staying in the car they would disturb the sheep; that, while it was dangerous, it was quicker and more convenient. When on the tops of the cars, going back, it was cold and snowing hard. He says, in substance: "The wind and snow was blowing in our faces, and we had all we could do to stay on the top of the cars. I did not look for snowsheds when going back. The snow was whirling around us so that we could hardly see what we were doing. We had all we could do to get over the tops of the cars. We could have passed through the cars with Spencer, but did not want to pass through all the rest of the cars. Spencer remained in the car, and was safe. The snow was just drifting and blowing across the tops of the cars, and we couldn't see very well, and we faced all these things rather than stay down there with Spencer. In going over the tops of the cars,

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towards the caboose, we did not look back to see if the train was approaching the snowsheds. I knew there were snowsheds in that vicinity, but I supposed I would hear a signal before entering them. I knew I was in a dangerous place, and did not look behind to see if we were approaching the snowsheds. We had all we could do to see the cars in front, and to see where we were going. If we had looked back we probably could have seen, but we might have been in danger of falling over. We might have laid down and looked around. Q. It was safer to go through there than to climb up when the wind and snow were blowing? A. Possibly it was safer, but it was not as quick. It was more convenient to go on top. Certainly it was more dangerous. It grew dark on the train entering the snowsheds. It was dangerous at that time in getting over the tops of the cars. I knew the train would stop at a number of places west, but did not know how far it was to the next place. I worked on that road eleven months, but did not know how far it was from Truckee to Summit. I do not suppose the conductor knew right where we were, but he knew we must be somewhere on the train, in charge of the stock. We left Spencer in the car to finish his job. He stayed there until after the accident happened. The accident happened a minute and a half after we left him. He had to go through one more car after we left. I did not hear the whistle." The wind was blowing in appellant's face as he went east, with his back to the engine. The train was going down grade after leaving Truckee. The snowsheds were built of substantial material, but not high enough for the plaintiff to ride erect upon the refrigerator cars while passing through them. These sheds were substantially built, several years ago, with reference to the contour of the ground, the shape and slant of the mountains, and curves of the road. Respondent contends that there are nearly 40 miles of these snowsheds constructed upon this road in the Sierra Nevada mountains, near the locality of this accident. The evidence shows that there are many sheds below Truckee and Summit.

In viewing this question, it is proper for the court to take into consideration the history and geography of the country, the monuments constructed by nature, and the rugged formation of the Sierra Nevada mountains near where this accident occurred. Negligence consists in the want of that ordinary, reasonable care, which would be exercised by a person of

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ordinary prudence, under all the existing circumstances, in view of the probable danger and injury. So ordinary care is due precaution against a danger likely to happen, and reasonably to be anticipated. Or, as Mr. Justice SWAYNE defines it in *Railroad Co. v. Jones*, 95 U. S. 439: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or commission." The law does not impose impracticable rules of duty, but is satisfied with what is reasonably fair under the circumstances. While the negligence of a railroad company may be the cause of an injury, yet if the injured party was careless himself; if his want of attention and care for his own safety contributed to cause the injury of which he complains,—he cannot recover. Justice MILLER, in *Cunningham v. Railroad Co.*, 5 McCrary, 471, 17 Fed. Rep. 882, carries the rule still further, and says: "For, although the railroad company's negligence may be a cause, and probably a principal cause of this man's loss of life, yet, if he was so careless himself,—if his want of attention to his own safety contributed in any small degree to his death,—the railway company is not liable." In *Goodwin v. Railroad Co.*, 84 Me. 203, the court held, in a similar case: "The danger of standing on the narrow platform of a passenger car, while the car is moving with the usual speed of railroad trains, is most conspicuous. No prudent man, no man ordinarily mindful of his own conduct and of matters about him, would occupy such a position. The greater the speed of the train, the more imminent the danger in such a place. Thoughtful people shudder instinctively when they see a person taking such risks. Curves are necessarily frequent on railroads in Maine,—a fact well known to all, and a fact which makes the riding on the platform of a car most perilous. The knowingly incurring such an imminent, visible peril, the choosing to ride in such a conspicuously dangerous place, must be held by all reasonable people to be recklessness in a high degree. The danger, the chance of injury, is visibly imminent and great. No man of reason can fail to apprehend it. No prudent man would fail to avoid it. There seems to us no doubt, no room for debate or question, upon this proposition." In the case referred to, the conductor took the passenger's ticket on the

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platform, and did not give him a seat in a closely-crowded car, on a hot, disagreeable day, and did not object to his riding on the platform. The court said: "All these circumstances may have made it more agreeable to ride on the platform, in the open air, than to stand inside the hot, crowded car; but they did not in the least lessen the danger, nor the appearance of danger, in so doing. That Goodwin was not ordered off the platform could not have led him to believe that it was safe there. He needed no warning of such danger. He knew the place for passengers was inside the car. The discomfort of the hot and crowded car did not make it any more prudent for him to ride outside upon the platform. Within the car, with all its discomfort, was safety. Without the car was obvious peril. The safe path is often more narrow and difficult than the way which leads to destruction, but no man is excused, for that reason, from seeking the one and avoiding the other." It is a general rule, and this court has held in the case of *Guibell v. Railway Co.*, 7 Utah 122, "that it is incumbent on the plaintiff to show that the injury of which he complains was caused by the negligence of the defendant, and that it did not arise from his own negligence or want of care. He cannot recover if he was negligent, because it cannot be said that defendant's negligence caused an injury which could not have happened but for his own want of care. Where, therefore, from the whole evidence on which the case rests, it appears that the plaintiff was wanting in prudence and care, or that he directly or proximately contributed to cause the injury he received, or that by the use of ordinary care and prudence he could have avoided the injury, the court, it is held, may rightfully instruct the jury, as a matter of law, that the plaintiff cannot recover, even though the defendant was guilty of negligence. And while the court should not invade the province of the jury, and pass upon the weight of the evidence, yet, where the jury have made a clear and unquestionable mistake of fact, or prejudices of the jury have so clearly controlled their mind as to find a verdict where there is no evidence upon which to base it, the appellate court has the right, and it is his duty, to rectify the wrong done, and to set aside the judgment upon which such erroneous judgment is based, and grant a new trial. Where there is no conflict of evidence whatever upon the questions of fact presented, and such evidence falls short of making a *prima facie*

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case for the plaintiff, it is then the duty of the trial court to take the case from the jury. The case, however, should be a clear one, to justify the court in exercising this responsibility; but when the necessity exists the court should not shrink from the responsibility. The question of negligence, diligence, or reasonable care is one of mixed law and fact, and seldom exclusively one of fact. Jurors may act upon a question only where there is some evidence tending to prove it. The relevancy and admissibility of evidence, and the tendency to prove diligence or negligence, or whether there be any such evidence, is a question of law, to be determined by the court; and where the facts are found or admitted, or where there is no dispute or question as to what the facts are, and if they be such that all reasonable men would be likely to draw the same inference, or in a case where there is no evidence tending to prove a case of negligence, the question is one of law.”

“ While there may be some difficulties in the way of this rule in the same cases, yet the courts are held and bound judicially to know that absence of due care is not due care, and that no care is not due and reasonable care; that the absence of proof of negligence does not prove negligence. Jurors should act upon the question of diligence, negligence, and reasonable care, when there is evidence in the case to prove it. If there be no evidence, there is nothing before them upon which to find negligence, diligence, or care.” *Robinson v. Railroad Co.*, 5 Misc. Rep. (N. Y. C. Pl.) 209; *Fitzgerald v. Paper Co.*, 155 Mass. 155; *Railroad Co. v. Miller*, 25 Mich. 274; *Conely v. McDonald*, 40 Mich. 158; *Carver v. Plank-Road Co.*, 61 Mich. 584; *Quibell v. Railway Co.*, 7 Utah 122. The passenger is bound to conduct himself, while upon the train, in a prudent manner; and if he unnecessarily or negligently expose himself to danger, and as a consequence is injured, he cannot recover redress from the company, although it was negligent, because in such a case the fault was mutual. *Brennan v. Railroad Co.*, 45 Conn. 284; *Willis v. Railroad Co.*, 34 N. Y. 670; 2 Wood Ry. Law, p. 1083; *Patt. Ry. Acc. Law*, p. 282; *Railroad Co. v. Langdon*, 92 Pa. St. 21; *Goodwin v. Railroad Co.*, 84 Me. 203. The fact that a passenger did not know that his act was careless will not avail him, as he was bound to know. Passengers passing from car to car unnecessarily, do so at their own risk, and are bound to know that it is dangerous to do so. *Railroad Co. v. Hender-*

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son, 43 Pa. St. 449; McIntyre v. Railroad Co., 37 N. Y. 287. If the facts are undisputed, and fail to show that the plaintiff was in the exercise of due and reasonable care at the time of the accident, it is the duty of the court to instruct the jury that he cannot recover. Gavett v. Railroad Co., 16 Gray 501; Todd v. Railroad Co., 3 Allen 18; Patt. Ry. Acc. Law, 285; Banking Co. v. Letcher, 12 Am. & Eng. R. Cas. 115; Railroad Co. v. Aspell, 23 Pa. St. 147; 2 Wood, Ry. Law, p. 1121. One who voluntarily assumes a position of danger, the hazards of which he understands and appreciates, cannot recover for an injury from a peril incident to the position of danger known to him, and the court should take the case from the jury. Robinson v. Railroad Co., 5 Misc. Rep. (N. Y. C. Pl.), 209; Fitzgerald v. Paper Co., 155 Mass. 155.

Under the facts stated, was it negligent for the defendant to construct its snowsheds so as not to admit the plaintiff to ride on the tops of the refrigerator car? And was it also negligent to switch the refrigerator cars between the caboose and the sheep cars? We will consider these question together. The court, in its opinion, does not find the respondent negligent in the construction of the sheds, but holds that it is inclined to that view. In this I cannot agree. One knowing the danger from the negligence of another, and who understands and appreciates the risk therefrom, and who voluntarily exposes himself to it, is precluded from recovery for any injury which results from the exposure. Fitzgerald v. Paper Co., 155 Mass. 155. The case of Railway Co. v. Carpenter, 56 Fed. Rep. 451, is relied upon to sustain appellant's position. That case is based upon a different state of facts from that surrounding this. In that case the injured party had no knowledge of the existence of the bridge, or of its dangerous character, or of his close proximity to it. In this case the plaintiff had worked for the company on its railroad, at and about Truckee, which is about three miles east of the place of the accident, for 11 months prior to the injury. He had passed over the road twice, in passenger cars, before the injury. He had passed under one snowshed, and knew there were plenty of them between Truckee and Summit, which was the next stopping place, and he must have known that the train would arrive in Summit within half an hour. He must be held to have had actual knowledge of the existence of the snowsheds, and of their dangerous character to one riding on

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the tops of the cars. In that case the bridge was an isolated structure, located upon an open, well-inhabited country. In this case the snowsheds were located, one following another, on the top of the Sierra Nevada mountains, away from habitation, over the curving, winding track of the road along the precipitous sides of the mountains, and over ravines made almost inaccessible by nature, covering an extent, as counsel claims, and as the court must presume, from the geography of the country and from the proof, of nearly 40 miles, and so constructed along the mountain sides as to protect the track and passengers from the avalanches of rock, ice, and snow slides during and following the fearful storms prevalent in such a mountain desolation. In that case the owner was in charge of the cattle cars, and there were no doors provided for the attendants to pass from one car to enter into another. The accident occurred at 3 o'clock P.M., on a pleasant day, with no wind or storm in progress. In this case the accident occurred at night, in the midst of a blizzard in the mountains, where the plaintiff was in care of sheep placed in sheep cars with openings in each end and constructed purposely so that the attendant could pass from one car to another without climbing on the top of the car, or exposing himself to danger. Plaintiff knew the refrigerator cars were placed between the caboose and the sheep cars before he left Truckee, and objected to having them thus placed to prevent ingress to the caboose. The construction and location of the cars was a notice to him that any other mode of riding was dangerous. Cattle cars were not so constructed as to admit the attendants, on account of the danger from the cattle, but this would not apply to sheep. By the refrigerator cars being placed where they were, he knew he could not pass over them without danger, in that country. In that case the evidence tends to show that the plaintiff had the right to be on the top of the car when he was struck by the overhanging bridge. In this case the plaintiff sought the tops of the cars as a means of more conveniently returning to the caboose, with a knowledge that the refrigerator cars were placed between the sheep cars and the caboose, and that the refrigerator cars were higher than the sheep cars, and without openings in the ends, and knew that he had assumed a place of danger. Both himself and his companion, Nelson, knew that these snowsheds were there, and plenty of them, at the time. He knew that there

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was a fearful wind and snow storm prevailing in these mountains at the time,—so fearful that the snow nearly blinded them; and they did not stop to look back to discover the sheds, for fear of falling off. It was then growing dark. He knew at the time he was in a dangerous position, and if he looked back he could have seen the sheds before reaching them. He knew Summit was the next stopping place. As a railroad man, he should be held to know that the sound of the whistle for the snowsheds could not be heard 25 car lengths during that fearful storm, when the wind was blowing the sound from him; and yet the plaintiff underwent all these hardships and dangers simply because it was cold and disagreeable in the sheep cars, and his presence there might disturb the sheep. The distinction between the facts in the case referred to in 56 Fed. Rep. 455 (Railroad Co. v. Carpenter), and the facts of this case, are so different that it cannot be taken as authority in this case.

But the appellant contends that he has proved a custom among stockmen to ride on the tops of the cars while having care of stock. Let us see if such proof is shown to apply to this mountainous country, when sheep are being shipped, and, if it was the custom, then should the respondent still be held liable. Nelson testifies that “he knew the custom of stockmen, shipping cattle and sheep, about going into cars and attending to them, and walking back over the tops of the cars to reach the caboose over that road.” “It was in handling sheep that we got on the cars after attending to them.” “It is customary, in handling sheep, to go through the cars.” “The cars are fixed so you can go through the end doors.” “The country where this snowshed is built is on the side of a mountain.” “I never made a careful examination of this snowshed, but have looked at it as I passed on stock and passenger trains, and that is all I know about it.” “They have wind and snow storms in that region, and the snow is very deep.” Plaintiff testified that “he knew the custom of the company in permitting men in charge of sheep and cattle to attend them, and walk back over the tops of the cars to the caboose.” “In shipping sheep, we always have the cars so we can pass through them, from one car to another, without getting on top.” Plaintiff was asked to describe the custom in shipping sheep, and he replied: “Well, in shipping sheep they always have cars so they can pass through them, from

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one end of the car to the other, without getting on top; but with cattle it is different. They use prod poles to stir them up." "This was done frequently while I was working for the company." Plaintiff did not work on the road west of Truckee, where the accident occurred, and knew nothing of the custom west of Truckee. Pascal and Foster testified on direct examination, in substance, that it was customary for stockmen to walk back over the tops of the cars to the caboose, when caught out, and the train started, while attending stock, and further stated that they did not know whether it was customary for stockmen to go into the cars to attend to stock, and return over the tops of the cars to the caboose, while the train was in motion, in shipping sheep, and that they did not ship sheep on the railroad. This testimony is exceedingly meagre, unsatisfactory, and uncertain, so far as it tends to show the custom, with the knowledge of the company, of stockmen in shipping sheep on this mountain road west of Truckee, and does not nullify that settled rule of law which will not permit a custom, when clearly shown, to excuse a person from having been negligent, any more than it will justify him in committing a crime. Even if the evidence of a custom was reasonable, general, legitimate, and certain, it would not establish a *prima facie* case, nor refute or justify a clear case of gross or contributory negligence. The only effect such evidence could possibly have, if made reasonable, general, definite, and certain, would be to lessen the probability of appellant's contributory negligence. The witnesses say that they knew the custom, but it does not satisfactorily appear that plaintiff knew it, nor what that custom was when applied to respondent's road and to shippers of sheep, except that in the shipments of sheep the attendants pass through the end doors from car to car. The purpose of constructing end doors in cars was doubtless to remove the danger attending the passage over the tops of the cars. While this is true as to sheep, the custom may still remain as to cattle shipments, about which the witnesses intended to testify. It is certainly not clear that the custom, if it was such, applied to shipments of sheep in cars provided with end doors, over this road, if the custom existed at all. If the custom existed, it does not appear to be reasonable, certain, general, and uniform, when applied to the facts as shown by this record, in shipments of sheep. The snowsheds were constructed many

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years ago, at a vast expense, in this barren, desolate mountain waste, and their existence and usefulness have become a matter of history. Their construction must have been, of necessity, of various heights and lengths, suitable to the contour of the country, and built so as to slope with the ground, and thus become of use to carry off snow drifts, snow slides, debris, and rock, and thus make it possible to cross the mountains with reasonable safety. The reason which may prompt the asserted rule as to the height of covered bridges in accessible and less dangerous and level localities, if it exists, cannot and should not apply to these structures in the Sierra Nevada mountains. The appellant was a passenger of mature years and understanding. He had worked within two or three miles of the snowshed in question for several months. He was a railroad man by occupation. He knew the location of these sheds, and that there were plenty of them in that locality. He knew, or should be held to know, that the next station was but seven or eight miles distant. He knew the refrigerator cars were between him and the caboose. It was growing dark. He had voluntarily placed himself in a dangerous position, where he says he did not, and from the circumstances he must have known he would not be liable to, hear the whistle of the engine for the sheds that he knew were there. He did not look for the danger that he knew existed in the presence of the sheds. Yet in midwinter, and when it was getting dark, in the midst of a mountain blizzard, at a time when it would be almost unsafe to remain upon solid ground; at a time and place which he says he knew was dangerous and unsafe, and when the conductor did not know he was on top of the car; at a time when the wind was blowing, and the snow was piling up around him, so he could scarcely stay on the car, and he was nearly blinded,—he left a safe place in the sheep car, and after passing under one snowshed, and without looking for the next, in utter disregard for his own safety, he undertook to pass over the refrigerator cars to the caboose, simply because it was cold and not pleasant in the sheep cars, and by remaining there he might disturb the sheep, and that by going over the cars he could get back to the caboose more quickly. It is difficult to imagine a more daring, reckless, or negligent act on the part of any sane man. Such conduct constituted more than contributory negligence. It was manifestly the grossest negligence. These acts of

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extreme folly, rashness, and gross negligence I cannot denominate reasonable. I cannot say he was in the exercise of reasonable care, in view of the probable and apparent danger, under the circumstances in proof. He did not do what an ordinarily prudent man would have done under like circumstances. All reasonable men could not agree otherwise than that appellant's conduct was grossly negligent and wholly inexcusable. The proximate and immediate cause of the injury complained of is directly traceable to the want of ordinary care, caution, and manifest reckless conduct of the appellant in the face of known danger voluntarily assumed.

Respondents allege that the refrigerator cars were empty. The evidence does not show they were loaded cars, or were not empty. If this was so, or if they were lighter cars, as they appear to have been, common prudence for the safety of passengers and trains would seem to dictate that in going up and down the mountain sides, upon a curved and winding track, in such a country as this, the heavily loaded cattle and sheep cars should be placed next to the engine, and the light or empty cars placed in the rear, for safe handling. The managers of lines of railroads could not safely conduct their business and run their trains if it must be left to the demand or judgment of every inexperienced shipper over their lines where their product must be carried in their trains, at a risk on the part of the company of being held negligent for the failure to observe or decline such demand. Under the circumstances, there was no negligence in placing the refrigerator cars in the rear of the train. It would have been negligence on the part of the company to place the light cars next to the engine. A reckless or inexperienced passenger should not be allowed to control or manage the manner of making up a train, in opposition to the skilled and experienced judgment of the officers and employes of the company. While railroad companies should be held to a strict accounting for their negligence which causes injury to their employes without their fault, I cannot concur in the opinion of this court that the same rule should apply to passengers, such as the appellant was, when they assume risks to life and limb, and recklessly walk on the tops of freight cars in passing through a mountain country, at such a time and under such circumstances as this record presents. I am of the opinion, also, that the snowshed, in the locality shown by the record in this case, and

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which we must also presume, from the geography, history, and natural monuments of the country, to exist, was constructed with reasonable safety, considering the purpose for which it was constructed, and the mountainous country in which it is located, and that it does not lie with the appellant to hold the respondent liable for his own rash, negligent, heedless, and reckless conduct in experimenting with his own life as he is shown to have done on the night in question. Appellant voluntarily assumed a position of known danger, and, appreciating the risk therefrom, he voluntarily exposed himself to it, and he was precluded from a recovery for an injury which resulted from the exposure caused by his own negligence.

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v.

WARLICK.

(Court of Appeals of Indian Territory, Feb. 15, 1896.)

Irrelevant Evidence.—In an action for damages for injuries occasioned by the negligence of a railway company, testimony tending to show material and permanent injuries not alleged in the complaint is inadmissible.

Instructions.—The use of the word “equally,” in an instruction to the jury “that the plaintiff will be entitled to recover * * * unless they should conclude from the evidence that she, by her own negligence, contributed equally with the defendant to her own injuries,” is error, and is not cured by the correct principle being laid down in another part of the instructions.

Care Required of Railroads.—A railway company is not charged with a higher degree of care and diligence than is exacted of private individuals under similar conditions.

APPEAL from the United States court for the Southern district of the Indian Territory. *Reversed.*

J. W. Terry and *P. L. Soper*, for appellant.

Albert Rennie, John A. McClure, and A. C. Cruce, for appellee.

SPRINGER, C. J.—On the 14th day of September, 1893, the appellee instituted a suit against the appellant, in what is

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now the Southern district of the United States court in the Indian Territory, at Ardmore, for damages claimed to have been received while appellee was a passenger upon appellant's train, and while she was endeavoring to alight from the train, at the station of Pauls Valley, Ind. T., on the 27th day of May, 1893. The complaint in the case is as follows: "That when said train was within a short distance of Pauls Valley, the destination of the plaintiff, an employé of defendant company announced 'Pauls Valley,' and invited plaintiff to depart from said train. That said train came to a standstill, and plaintiff immediately arose from her seat in one of the passenger cars of said train, and went to the steps of said car to get off. On going down said steps, plaintiff discovered that there was no platform or stool there for her to get off on, and no one there to assist her off, and that, on account of the height of the steps from the ground, she could not alight, and returned to the car, going through it to the platform and steps in front of said car; and, while endeavoring to get off said train, it started, and plaintiff was thrown violently on to the platform, on her head and shoulder, cutting her head, to the skull, about an inch in length, over her right eye, bruising and injuring her right arm and shoulder, and bruising and injuring her right leg. That on account of the negligence of the defendant company in failing to provide sufficient platforms and stools for its passengers to alight on; in failing to furnish employés to assist its passengers to alight from its trains safely; in the employés of defendant company, on said train, failing to assist and see plaintiff depart safely from said train; in not holding said train a sufficient time at said station to allow the plaintiff to depart in safety; in not seeing that plaintiff had departed from said train before starting,—plaintiff sustained injuries to her body as aforesaid, and has suffered great bodily pain, to her great damage in the sum of ten thousand dollars, and has been permanently injured in body, to her great damage, in the sum of ten thousand dollars, and has paid out, for surgeon's and physician's and druggist's bills, and sum of—, without any fault or negligence on the part of the plaintiff." Appellee claims that the following should be included in the statement of facts in this case: "When the train of appellant arrived at Pauls Valley, the plaintiff went to the rear end of the chair car, in which she was sitting, and went out of the door at which she had entered said train, for the purpose of

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getting off. She found that the rear end of the chair car was not up to the depot platform, when she went back into the car, and went to the front end of the chair car, and went down the steps, for the purpose of getting off. She testified that the train was moving slowly when she went out on the front end of the coach, and that she thought that the car was simply pulling up to the platform, and would stop when it got to the platform. After she got down on the steps of the coach, she discovered the train was increasing its speed, when she turned to go back into the car. Just as she turned, the train gave a jerk, which threw her from the platform, inflicting upon her the injuries of which she complains." The railway company, in its answer, specifically denies all material allegations in the complaint, and sets up contributory negligence on the part of the plaintiff in the case below, who is the appellee in this court. The case was tried by a jury, which returned a verdict for the plaintiff for the sum of \$4,200. Appellant filed a motion for a new trial, which was overruled; and on account of such verdict, and the alleged error of the trial court in overruling defendant's motion for a new trial, the appellant brings this case, upon an appeal from the entire proceedings, and prays that said judgment may be reversed, and the cause remanded for a new trial.

Appellant submits an assignment of 35 errors in the case. It is not necessary to consider all the assignments of error in detail. It will be sufficient to consider the following:

The first assignment of error is as follows: "That said defendant was taken by surprise in the trial of said cause, which ordinary prudence could not have guarded against, in this: that said plaintiff was permitted to introduce evidence, over the objection of defendant, tending to show that the injury received by plaintiff, as alleged in her complaint, caused the bursting of the right eyeball of plaintiff, and occasioned blindness and pain, from which plaintiff suffered, not only in the right eye of plaintiff, but also in the left eye; and, in support hereof, defendant attaches hereto affidavits, which it makes a part hereof." Assignments of error numbered 15, 16, 17, 19, 20, 21, 22, 23, and 24 are similar to the first assignment which is quoted, and which alleges error in permitting, over the objection of defendant, testimony tending to show injury to the eyes of appellee. The allegation in the complaint which

**Irrelevant
evidence.**

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describes the injury of the appellee is as follows: "The plaintiff was thrown violently on the platform, on her head and shoulder, cutting her head, to the skull, about an inch in length, over her right eye, bruising and injuring her right arm and shoulder, and bruising and injuring her right leg." And, further, that "plaintiff sustained injuries to her body as aforesaid, and has suffered great bodily pain, to her great damage in the sum of ten thousand dollars, and has been permanently injured in her body, to her great damage, in the sum of ten thousand dollars," etc. It appears from an examination of the complaint that it nowhere alleges any injury to either of the eyes of the appellee. It merely states that her head was cut, to the skull, about an inch in length, over her right eye. The words "over her right eye" are used in the complaint as merely descriptive of the location of the cut upon the head, and the bruising which is alleged, such as to her right arm and shoulder and to her right leg, and subsequently in the complaint the reference is to the injury sustained to her body as aforesaid. Under this allegation in the complaint, plaintiff in the court below was permitted to introduce evidence, over the objection of the defendant, tending to show, as alleged in the assignment of error, that the injury received caused the bursting of the right eyeball of the plaintiff in the case below, and occasioned blindness and pain, from which she suffered, not only in her right eye, but in her left eye; and it is contended by the appellant that the alleged injury to the appellee's eyes was the principal ground upon which the jury must have awarded the damages in this case. The plaintiff below could have amended her complaint at the time of the trial by alleging injury to one or both of her eyes, but such an amendment would have entitled the defendant below to a continuance. No amendment was made, and the court permitted the introduction of testimony under the pleadings as they stood, showing injury to one or both of appellee's eyes, and great bodily suffering on that account. We are of opinion that, under the pleadings as they stood at the time of the trial, testimony tending to show injury to her eyes was inadmissible, and that the court erred in admitting such testimony, especially in view of the fact that the injury which the eyes are alleged to have sustained was, in all probability, the principal basis upon which the jury awarded the damages in this case.

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Appellant assigns as error the giving of the following instruction to the jury by the court below: "The plaintiff will be entitled to recover in this case if all the facts and circumstances which are in evidence before the jury show that she was injured by the negligence of the defendant, and that she was free from negligence herself. So that if you should determine from the testimony that the plaintiff, Mrs. Warlick, was injured at the time and place mentioned in her complaint, and in the manner suggested therein, and that such injury was the result of, and caused by, the negligence of the railway company, it will be your duty to find for the plaintiff damages in such sums as may appear to be warranted by the proof, unless you should conclude from the evidence that she, by her own negligence, contributed equally with the defendant to her own injuries." This instruction in the first sentence clearly states the law applicable to this case, namely, that the plaintiff would be entitled to recover if all the facts and circumstances show that appellee was injured by the negligence of the appellant, and that she was free from negligence herself; but in the concluding sentence of the same instruction appears the phrase, "unless you should conclude from the evidence that she, by her own negligence, contributed equally with defendant to her own injuries." Counsel for appellee insists that the word "equally," as used in this instruction, means "likewise," or "in a like manner," and it should not be construed in its ordinary acceptation, as meaning equal in degree or quantity. This contention seems to us untenable. The word "equally," as used in this instruction, can have no other meaning than that which is ordinarily given to the word. It means, in this connection, that the jury should return a verdict for the plaintiff unless she contributed equally with the defendant to her injuries. If the negligence of the plaintiff in the court below was one of the proximate causes of the injury,—if it contributed to the result,—she cannot recover, even though the negligence of the appellant also contributed to it. The error in the latter part of the instruction, in the use of the word "equally," is not cured by the correct principle which is laid down in the first sentence of the instruction. "Contradictory instructions, if allowed, would make trial by jury a most mischievous institution." *Clem v. State*, 31 Ind. 480. Instructions which are necessarily contradictory should not be given,

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for it would be impossible to tell which of them the jury accepted as the basis of their verdict. *Pound v. Turck*, 95 U. S. 461.

Appellant assigns as further error the giving by the court of the following instruction: "The railway company is, by the law, charged with a higher degree of care and diligence in dealing with passengers than is exacted of private individuals under similar conditions." Appellant contends that this instruction is clearly erroneous, in that it charges a railway corporation with a higher degree of care than is exacted of private individuals. In other words, when a railroad corporation operates a railroad it is charged with a higher degree of care and diligence in dealing with passengers than the law would exact if the railway was owned and operated by private individuals. The appellee contends that this instruction states the law correctly, and cites the case of *Shoemaker v. Kingsbury*, 12 Wall 369, in which it is held by the supreme court "that public carriers or railroad corporations, in carrying passengers, are held to 'the utmost diligence of very cautious persons,' or, 'the greatest possible care and diligence,' or, 'the most perfect care of cautious and prudent persons.'" Appellee also cites *Hutch. Carr.*, § 501, in which it is stated that the duty of the carrier is to provide for the safety of his passengers, "as far as human care and foresight will go." A careful examination of these authorities will show that the error assigned as to the instruction in question does not bring it within the rule laid down in *Shoemaker v. Kingsbury*, or in *Hutchinson on Carriers*, which is to the effect that the railroad company is charged by law with "utmost diligence of very cautious persons," or, "the most perfect care of cautious and prudent persons," or, with diligence "as far as human care and foresight will go." The instruction which is alleged to be erroneous states that the law charged the railroad with a higher degree of care and diligence than is exacted of private individuals under similar conditions. The word "higher," which is used in the instructions, was calculated to mislead the jury, in this: that the railroad company was required by law to exercise, not the utmost diligence of cautious persons, but a higher degree of diligence than persons would be required to observe under similar conditions. It will not be contended that if a railroad belonged to, and was operated by, private

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individuals, they would be subject to a less degree of diligence than a corporation is required to observe. If the instruction had stated that the railway company is charged by law with the utmost diligence of very cautious persons, or the most perfect care of cautious and prudent persons, it would have been within the rule. But in so far as it required a higher degree of care and diligence than private individuals, under similar conditions, would be required to exercise, it is erroneous.

The facts in this case do not show that the railway was guilty of any negligence in the construction of the depot platform at Pauls Valley. The railroad company is not required by law to construct a depot platform of sufficient length to furnish suitable means to enable passengers to get off the train at both ends of every passenger car on the train. If, at the time the train stopped at Pauls Valley, there was at one end of the passenger car, in which the appellee was a passenger, a suitable platform, upon which she could have alighted in safety, it was her duty to ascertain beforehand at what end of the car she might get off. The fact that she went to the end of the car which had not reached the depot platform, and there, having discovered her mistake, returned to the car for the purpose of getting off at the other end, was a mistake on her part, for which the railroad company could not be held responsible; and the further fact that no injury whatever resulted to her, proximately or even remotely, by reason of her approaching the end of the car which had not reached the platform, and that she, acting as a prudent person would do under the circumstances, did not attempt to alight at that end of the car, but, on discovering her mistake, returned to the end of the car at which she could properly get off, shows conclusively that the railroad company was not guilty of any negligence by reason of any defect or imperfection in the depot platform, so far as this case is concerned. It is contended, however, by counsel for appellee, that, if she could have gotten off the train at the end of the car which she approached, she would not have consumed the time in which she could have descended from the car at the other end, and that the failure of the railroad company to provide a suitable means of getting off the car at the end which she first approached was such negligence on its part as contributed directly to the injury which appellee received in endeavoring .

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to get off at the other end of the car. This contention is, in our opinion, not tenable. If the railroad company is guilty of negligence in this case, it must arise from a failure to furnish a suitable platform, on which appellee could have alighted from the train at the end of the car at which she attempted to get off, or in remaining at the station a time too short to afford appellee an opportunity to get off the train in safety. There is no evidence in the record which tends to prove that the depot platform was defective in any respect at that end of the car. The statement in appellee's brief is, "She testified that the train was moving slowly when she went out on the front end of the coach, and that she thought the car was simply pulling up to the platform, and would stop when it got to the platform." If appellee had thought, when she discovered that the car was in motion, that it was simply pulling up to the platform, and that it would stop when it got there, she should not have gone out on the front end of the coach, but should have remained inside until the car came to a standstill. It was negligence on her part to have gone out on to the platform of the coach while the train was in motion, and this negligence was the proximate cause of the injury which she received, and without which she would not have been injured. When she found the car was in motion, she should have remained inside until it stopped, and, if she found that the train was carrying her by the station, she should have notified the conductor, or some employé of the road, at the earliest time possible, that she was being carried by the station at which she desired to get off. It would then have been the duty of the employés of the railway to stop the train, and back up to the station, and assist her in getting off in safety. From a careful review of the record in this case, we are of opinion that the injury to appellee resulted from her own negligence, and that the railway company, under the pleadings and evidence as disclosed by the record, is not responsible for the injury which she received. Therefore the judgment of the court below is reversed, and the case remanded, with directions to set aside the verdict and take such further proceedings as may be consistent with this opinion.

LEWIS, J., concurs in this opinion.

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WILSON

v.

SOUTHERN PAC. CO.

(Supreme Court of Utah, April 15, 1896.)

Res Gestæ.—In jumping from a wagon struck by a train of cars, plaintiff was injured, and immediately after, the train having moved along, plaintiff walked across the track, and said to the switchman, "Who is to blame for this?" who answered: "It was the engineer. I told him to stop, and you to cross." *Held*, that this conversation was admissible as part of the *res gestæ* but not as an admission of the company.

Train and Vehicle at Railroad Crossing.—When a train and vehicle approach a highway crossing at the same time, the latter should stop, but the train should not, by stopping on the crossing or moving backwards and forwards, subject the vehicle to unreasonable delay.

Expenses for Medical Attendance.—Proof of expenses incurred by a person injured for necessary medicine, medical attendance, and nursing, may be made when properly alleged in the complaint, though they have not been actually paid.

APPEAL from Weber county district court. *Affirmed.*

Marshall & Royle, for appellant.

Evans & Rogers, for respondent.

ZANE, C. J.—This action was instituted to recover damages in consequence of an injury caused, as alleged, by the negligence of the defendant in controlling a train upon its railway at the point where it crosses Twenty-fourth street in Ogden City. The case was submitted to a jury, who returned a verdict of \$2,065 for the plaintiff. The defendant excepted to the judgment of the court upon the verdict, and to the order refusing a new trial, and appealed to this court, and assigns the same as error. The plaintiff claims that the evidence shows that defendant's negligence caused the injury. This claim the defendant denies, and it alleges that the injury was caused by plaintiff's negligence. It appears that the defendant had a switch at the crossing, and three parallel tracks running east and west across the street at right angles;

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that plaintiff was riding east upon the street, with one Fielding, his neighbor, who was driving; that Fielding stopped his team before reaching the west track, upon seeing a train consisting of 14 or 15 cars with an engine attached to the south end standing on the east track across the street, and that the train then moved north; that Fielding then drove across the west track, when the train moved back across the street, and he stopped again; the train then moved north, and Fielding started his team again; that the train then moved south across the street again, the north car clearing the street about a rod and a half. At this point an important conflict in the evidence is found. The plaintiff and Fielding testified that Dalton, the switchman, signaled, looking in the direction of the engineer, and then turned, and said to Fielding, "Come on"; while Dalton testified that he said to plaintiff, who asked him if they could cross: "No. Hold on. The slack of the cars will strike you." It further appears that Fielding started his team across the track immediately after the switchman spoke, and the train came back north; that Fielding tried to rein his horses off the track, and his wagon locked and the cars struck the wheel, and shoved it from 20 to 25 feet, and then suddenly pulled south again; that the car caught in the harness, and pulled the horses and wagon back 2 or 3 rods, when the harness broke; that when the wagon and team were being pushed, the plaintiff jumped out, and struck his shoulder against the wagon, and severely bruised it. It also appears that the plaintiff was well acquainted with the switchman, and after he got up he walked a few steps to where he was standing by his switch. The plaintiff testified that he then said, "Dal, who is to blame for this?" and that the switchman said: "It was the engineer. I told him to stop, and I told you to go on;" and that he then said: "Dal, did you tell us to go across?" and that he answered, "That is what I did." The switchman testified that the plaintiff walked across to him, but denied the conversation. The plaintiff testified that this conversation occurred within three minutes after the collision. When the above question had been asked and answered, the defendant entered a motion to exclude both from the jury, but the court denied the motion, and he excepted. This ruling of the court the defendant assigns as error.

Before determining the effect of the evidence upon the

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issues of fact involved on the trial, it is necessary to decide this error. Defendant's counsel correctly urge that the switchman was not authorized, after the occurrence, to make any admission of negligence on the part of the defendant or of care by the plaintiff. Any narration by him, subsequent to the occurrence, of the facts not made upon the witness stand, was inadmissible. But the acts and declarations of the switchman constituting a part of the *res gestæ* were admissible, though given to the jury by a third party. The *res gestæ* included the fact that the train stood across the street,

Res gestæ. and the movements of the cars, and the different attempts of Fielding to cross, and what was said or done by him or the plaintiff, the switchman, or the engineer, during such movements, the jumping from the wagon when it was struck, the fact that the train then moved back; that Fielding drove on, and that plaintiff walked across the track to the switchman, and what they then said, were all so connected as to constitute a part of the transaction, and therefore a part of the *res gestæ*. All of these acts and declarations were the immediate expressions of the fears, the intentions, and the conflicting purposes brought into play by the occurrences of the occasion, the situations of the respective parties, and their dangers and emergencies, real or apparent. *People v. Daniel Kessler*, 44 Pac. Rep. 97; *Sullivan v. Salt Lake City* (decided at this term of court), 44 Pac. Rep. 1039.

We come now to the question of fact, was there any proof of negligence on the part of the defendant? The evidence shows that the plaintiff was traveling on a street of Ogden City, a public road, and found defendant's train standing across the street; that the train then moved north of the street; that the team moved across the first track; that the train then moved south across the street; that the team then stopped; that the driver of the wagon, seeing that the car had gone beyond the south line of the street, started again, when the train ran back again across the street, and struck the wagon, before it could get off the track. The engineer must have seen the men in the wagon attempting to cross, yet he continued to run his train backwards and forwards across the street without paying attention to them. The engineer should have given the wagon a reasonable time to cross over after he moved the train off the street. But, conceding the defendant was guilty of negligence, the defendant

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insists that the plaintiff was guilty of negligence contributing to the injury. Whether the switchman said to the men in the wagon, "Come on," or "Hold on," presented a question of fact, under the evidence, for the jury to determine. The jurors probably found that he said "Come on." If they did so find, they certainly were justified that the plaintiff used due care in attempting to cross. But it is said that the plaintiff negligently jumped out of the wagon. The wagon and horses were being pushed by the train when he made the leap. As a prudent man, he may have thought he would be safer on the ground. It was proper for the jury to characterize this act from the evidence.

The defendant's counsel insists that the court erred in stating the relative rights of the parties in the following paragraph of the charge: "Now the law is that upon crossing a highway and of a railroad track the railway trains have the right of way; that is, they have the right to pass first. The wagon must stop for the railway train to pass, instead of the railway train waiting for the wagon to pass. But this right does not authorize a railway company to continue passing and repassing, and thus exclude wagons from the crossing. The wagon must stop, in the first instance, to permit the train to pass, if one is ready to pass; but the rule does not go so far as to require it to continue to wait for trains to pass and repass upon the same track, or for the same train to do so." The court stated, in substance, that when a vehicle and train approach a crossing at the same time the vehicle should stop, and let the train pass; but the train should not continue to repass so as to prevent the vehicle from crossing afterwards. This was a correct statement of the law upon the point applicable to the facts before the jury. The paragraph embraces two propositions. The first applies to passing trains, the second to trains repassing. The vehicles can stop with less effort and inconvenience than a train, and, generally, time is more important to a train. Both, however, have the right to pass over the crossing. Neither has the right to the exclusive use of it. The railway has no right to obstruct a highway an unreasonable length of time with its trains, either by allowing them to stand on its crossings or by moving backwards and forwards. Persons in the use of either modes of travel have a right to pass without being subjected to unnecessary or unreasonable delay.

Train and
vehicle at rail-
road crossing.

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The defendant assigns as error the ruling of the court in permitting the physician to testify to his charges against the plaintiff for the surgical and medical treatment he gave him for the injury complained of, it appearing that the bill had not been paid. In view of the fact that charges were claimed as special damages in the complaint, we are of the opinion that the ruling complained of was not erroneous. If the plaintiff became legally bound to pay such amount for the treatment of the wound, caused, as alleged, by defendant's negligence, we are of the opinion that plaintiff was properly allowed to offer evidence to prove it, though it had not been paid at the time of the trial.

Expenses for
medical at-
tendance.

The plaintiff also insists that the damages were excessive. If the plaintiff was injured to the extent that his evidence indicates, the verdict would not be excessive. But if the injury was no greater than the defendant's evidence indicates, they would be. In view of the evidence, we do not feel authorized to find that the jury was actuated by passion, prejudice, or any improper motive. We find no error in the record authorizing a reversal of the order or judgment appealed from. The judgment of the lower court is affirmed.

MINER, J., concurs. BARTCH, J., dissents.

CHICAGO, B. & Q. R. Co.

v.

HYATT.

(*Supreme Court of Nebraska, April 21, 1896.*)

Power of Clerk to Sign Bill of Exceptions.—The clerk of the district court is clothed with the power to sign and allow a bill of exceptions, when it is made to appear by affidavit that the trial judge is absent from his district.

Judicial Notice.—This court will take judicial notice of the boundaries of a judicial district, and of the counties included therein.

Criminal Negligence.—It is the settled law of this state that the term "criminal negligence," as employed in section 3, art. 1, c. 72, Comp. St., means gross negligence, such as amounts to a reckless disregard of one's own safety and a willful indifference to the consequences liable to follow.

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Jumping from Moving Train.—Where a passenger knowingly jumps from a moving train, under such circumstances as to render the act obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby, it will prevent a recovery for the injuries received therefrom.

Case at Bar.—*Held*, under the facts proven in the case, that plaintiff was not guilty of such negligence in alighting from a moving train as to defeat a recovery for injuries received therefrom.*

ERROR to Lancaster county district court. *Affirmed.*

T. M. Marquett, J. W. Deweese, and J. A. Kilroy, for plaintiff in error.

C. M. Parker and M. B. Reese, for defendant in error.

NORVAL, J.—This was an action by Elizabeth Hyatt against the Chicago, Burlington & Quincy Railroad Company, to recover damages for personal injuries received in alighting from defendant's train, in the town of Tamora, in Seward county. The jury found a verdict in favor of the plaintiff for \$500, and also made and returned therewith the following special findings: “(1) How long did the train stop at the station at Tamora at the time complained of? Answer. One and a half minutes. (2) How fast was the train running at the time the plaintiff got off the same? Answer. About five miles an hour. (3) Did the conductor or any of the trainmen direct or request her to get off at the time she did, and after the train was in motion? Answer. No. (4) Did the plaintiff know that the train was in motion and running at the time that she came out onto the platform to get off, and about what part of the car was she in when she knew that the train had started to run again? Answer. Yes; near the center of the car. V. A. Markle, Foreman.” Judgment was rendered for the plaintiff upon the general verdict from which the railroad prosecutes error to this court.

We will first give attention to the objection of the plaintiff to the consideration of the bill of exceptions, which was not signed and allowed by the trial judge, but by the clerk of the district court. The authority of the latter to sign the bill of exceptions is now disputed. It has been frequently held that power is not conferred upon the clerk of the district court to settle a bill of exceptions unless the trial judge is dead, or is prevented from

Power of clerk
to sign bill of
exceptions.

* Syllabus by the court.

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doing so by reason of sickness or absence from his district, or the parties to the suit or their counsel have agreed upon the bill, and attached thereto their written stipulation to that effect. *Scott v. Spencer*, 42 Neb. 632; *Glass v. Zutavern*, 43 Neb. 334; *Nelson v. Johnson*, 44 Neb. 7; *Yenney v. Bank*, 44 Neb. 402; *School Dist. v. Cooper*, 44 Neb. 714; *Martin v. Fillmore County*, 44 Neb. 719; *Griggs v. Harmon*, 45 Neb. 21; *Rice v. Winters*, 45 Neb. 517; *Mattis v. Connolly*, 45 Neb. 628. The draft of the proposed bill was returned by counsel for plaintiff without any amendments being suggested, but neither the parties nor their attorneys agreed in writing to the bill. It was not, however, invalid for that reason alone. The clerk has the authority to allow and sign a bill of exceptions, even though it has not been agreed to by the parties to the litigation, where the judge is dead, or he is prevented, by sickness or absence from the district, from settling the bill. It is claimed that there is no showing that any one of these events has occurred. In this counsel for plaintiff are mistaken. There is attached to the bill the affidavit of J. W. Deweese, one of the defendant's attorneys, setting forth "that the Honorable A. S. Tibbets, judge of said court before whom the said cause was tried, is absent from the said county of Lancaster, and has been ever since the said bill of exceptions was returned by plaintiff's attorneys, and that said defendant is prevented, by reason of such absence, from having the bill settled and signed by the said judge," and praying that the clerk of the court may settle and sign the bill as provided by statute. The clerk, in his certificate allowing the bill, recites that the defendant had filed an affidavit setting forth the absence of the trial judge from the county of Lancaster. A lawful excuse was shown for not having the trial judge settle the bill, and such an excuse as justified the clerk in signing it. While it is true the statute specifies the absence of the trial judge from the district as a ground for the clerk's allowing a bill, yet the showing in this record is that Judge Tibbets was absent from Lancaster county, the county in which the cause was tried, which was sufficient to confer authority upon the clerk to act. This court will take judicial notice of the boundaries of the several judicial districts in this state, and in that way we know that, during the entire pendency of this cause in the court below, and since, Lancaster county alone comprised the Third judicial district. Judge

Judicial
notice.

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Tibbets being absent from such county, he was likewise absent from said district, and therefore the clerk possessed the power to settle, allow, and sign this bill of exceptions.

On the 23d day of March, 1892, the plaintiff, then 46 years of age, and by occupation a dressmaker, after purchasing a ticket from Lincoln to Tamora, boarded a passenger train on defendant's road, in Lincoln, taking a seat near the center of the second day coach. After the train started, her ticket was surrendered to the conductor, and a check was given her, which was taken up between Seward and Tamora, when she was informed by the brakeman, upon her inquiry, that the next stop was at Tamora, her place of destination, and the station was soon thereafter called by the brakeman. The train arrived at Tamora about 1.45 in the afternoon, making its usual stop, and the plaintiff immediately went out upon the platform of the car in which she was riding, for the purpose of getting off, but did not then do so, claiming that coach had not reached the station platform, and that the ground in front of her was covered with running water, which, together with the height of the car step above the ground, prevented her from alighting. Plaintiff thereupon, at the suggestion of a passenger, passed rapidly through the first day coach, the car immediately in front of the one in which she rode, in order that she might alight on the station platform. By the time she reached the center of this car she ascertained that the train was moving slowly towards the next station, yet she hurried through the car, and, on reaching the front platform thereof, she leaped or jumped off, spraining and bruising her right ankle and foot. It is on account of this injury that she sues for damages.

The acts of negligence alleged in the petition are as follows: "That upon the arrival of said defendant's train at said town of Tamora, which was her destination, and of which fact she had been informed by the conductor of the train, the said defendant stopped the train before it arrived at the depot or platform, which was more especially the case of the car occupied by plaintiff; that, immediately upon the arrival of said train, the said plaintiff hurriedly went to the platform to alight from said train or car, when she found the steps of said car were so high from the ground that it was impossible for her to alight from said steps; that the ground was so muddy that it was an impossible and unfit place for her to alight:

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that she then hurriedly ran through the next car in front for the purpose of alighting upon the platform prepared for that purpose; that, before she arrived at the front end of the car referred to, which was the next immediately in front of the one in which she was seated, the train had been started, and was in such rapid motion that, in getting off, she was by the motion of said car thrown down and seriously injured. Plaintiff further alleges that, at the time she alighted from said train, which was done in the shortest time possible after the train was stopped, there was neither brakeman, fireman, conductor, or any trainman there to assist her; that there was no trainman on said platform, nor anywhere in sight. Plaintiff alleges that, by the gross carelessness of said defendant, by its wanton and gross negligence in stopping said train before the car in which she was riding, and was compelled to ride on account of the crowded condition of the train,—before its arrival at the platform, and in not allowing sufficient time for her to alight from said train, and the gross negligence of said defendant in not having some of its assistants at their proper place to assist said plaintiff in alighting from said train, and by reason of the fall as above described, so received through the gross carelessness and negligence of said defendant, the plaintiff had her right foot and ankle seriously sprained, bruised, and injured.” The answer denies all negligence of the defendant, and alleges that the injury was caused by plaintiff’s own carelessness and negligence, and without any fault or want of care on the part of the company. The reply puts in issue the averments of the answer.

The testimony discloses that the train on which plaintiff took passage stopped at Tamora the usual length of time, sufficient to have allowed the plaintiff to alight had the car reached the station platform. There is a conflict in the evidence as to the exact place at which the train stopped. That introduced by plaintiff tended to show that the car in which she rode did not come up to the station platform, and that the lower step of the car was about two feet from the ground, which was entirely covered by water. The verdict being for the plaintiff, we must accept as true, although there is in the record evidence sufficient to sustain a different finding upon this point, that the company was guilty of negligence in not providing a suitable and convenient place for plaintiff to alight at the place she first made the attempt. It is argued

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that plaintiff cannot recover because the injury inflicted was attributable to her own gross or criminal negligence. Comp. St., c. 72, art. 1, § 3. This section makes every railroad company the insurer of the passenger's safety, "except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The term "criminal negligence," as above employed, has been defined to mean "gross negligence, such as amounts to reckless disregard of one's own safety and a willful indifference to the consequences liable to follow." *Criminal negligence.* Railroad Co. v. Chollette, 33 Neb. 143; Railroad Co. v. Landauer, 36 Neb. 643; Railroad Co. v. Baier, 37 Neb. 236; Railroad Co. v. Hague, 47 Neb. —, 66 N. W. Rep. 1000. In the case at bar the evidence shows that the plaintiff received her injury by jumping from a train while in motion. It is not, *per se*, gross negligence for a passenger to alight from a moving train. *Jumping from moving train.* Railroad Co. v. Landauer, 36 Neb. 643. Whether to do so constitutes such negligence as will defeat a recovery for injuries received is for the jury to determine, under proper instructions, from a consideration of all the evidence in the case. A passenger might be fully justified in jumping from a moving train to escape a threatened collision. Railroad Co. v. Hedge, 44 Neb. 448. And there are other instances or circumstances, doubtless, where a passenger would not be held guilty of gross or criminal negligence, should he alight from a car while in motion, in order to escape apparent imminent danger. So, too, a passenger, under certain circumstances, may be warranted in getting off a train while slowly passing a station. Railroad Co. v. Porter, 38 Neb. 226. As said before, whether a plaintiff, in any case, is guilty of criminal negligence, is purely a question of fact for the jury. But the finding upon that, like every other issue of fact submitted to a jury, must be based upon the testimony; otherwise, it will be disregarded by the reviewing court.

This brings us to consider whether this plaintiff was guilty of such negligence as will prevent a recovery. It is the duty of a railroad company to provide a suitable and safe platform or place for the exit of passengers at each station, and to stop its cars in proper position and for a sufficient time for them

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to alight with safety; and if it fails to do so it is guilty of negligence. According to plaintiff's testimony, the car in which she rode, and from which she first made the attempt to get off, stopped before it reached the station platform, and the ground at that place was inundated with water. Hence, she was not required to alight there. Discovering the situation, she hurried through the next car in front, in order that she might reach the depot platform, and succeeded in getting off before the platform had been passed. The train was not moving rapidly at the time,—not faster than a person can walk. The undisputed evidence shows that it had not yet moved the length of two cars after starting, and therefore it is not probable that the train in that distance could have acquired the speed found by the jury. A careful reading and analysis of the testimony fails to disclose that plaintiff, in alighting, under the circumstances, was guilty of gross negligence. She was fully justified in believing that she ran no risk of injury in stepping off the car. The case is analogous, in its principal facts, to *Railroad Co. v. Porter*, 38 Neb, 226, where a judgment for Porter was affirmed. The case at bar is distinguishable from *Railroad Co. v. Landauer*, 36 Neb. 643. There the plaintiff jumped from a rapidly moving train under such circumstances as to render the act obviously and necessarily perilous, and such as showed a flagrant and reckless disregard of the passenger's own safety, and a willful indifference to the injury liable to follow.

Complaint is made of the refusal of the court to give the six instructions requested by the company, but they are not argued in the brief. These requests, so far as applicable, are fully covered by the charge of the court. The judgment is affirmed.

Hillary v. Great Northern R. Co.

HILLARY

v.

GREAT NORTHERN R. CO.

(*Supreme Court of Minnesota, May 11, 1896.*)

Service of Process on Railroad Company.—The ticket agent at a union depot *held* to be the “acting ticket agent” of each of the railroads using the depot, within the meaning of a statute providing for the service of process in civil actions upon railroad companies.

APPEAL from Hennepin county district court. *Affirmed.*

W. E. Dodge, for appellant.

Frank Morrill and *William Kennedy* (Wilkinson & Traxler, of counsel), for respondent.

MITCHELL, J.—The only question in this case is whether the ticket agent in what is known as the “Union Depot” at Minneapolis was “an acting ticket agent” of the defendant, within the meaning of Gen. St. 1894, § 5202, providing for the service of process in civil actions upon railroad companies. The facts, as distinguished from mere legal inferences, are practically undisputed, and are quite fairly and fully stated in the memorandum of the trial judge. They may be summarized as follows: The Union Depot is owned and operated by the Minneapolis Union Railway Company. A number of lines of railway, including that of the defendant, use this depot for general depot purposes, and as a regular station on their respective roads, under contracts with the Union Railway Company, whereby, for a specified compensation to be paid to it by each of the other railroad companies, it is to furnish each of them trackage facilities into and through the Union Depot, transfer its cars, transfer and deliver baggage, furnish accommodations for passengers arriving or departing, and also sell tickets for each company; maintaining for that purpose a ticket office in the depot, where tickets are regularly sold at all hours of the day. The Union Railway Company employs the agents selling tickets at this ticket office, and such

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agents are responsible, and under bonds, to that company for the faithful performance of their duties. The different railroad companies furnish their tickets to these ticket agents, who report the sales thereof daily to the respective companies, and account to them at regular intervals for the proceeds of such sales. It also appears from the affidavits used on the motion that the defendant, in its folders and otherwise, holds out and represents to the public the ticket office in this depot as one of its ticket offices, and the ticket agent in that office as its ticket agent. We are of opinion that under these facts the ticket agent in the Union Depot was "an acting ticket agent" of the defendant, within the meaning of the statute. The contention of defendant is that the word "agent" means "an agent in the eye of the law arising from a contract of employment; one responsible to his principal, and subject to be discharged by it,"—and that within this definition the "ticket agent" at this depot is not its agent, but the agent of the Union Railway Company. We do not concur in this view. While the ticket agent is hired by, and under the control of, the Union Railway Company, yet he is performing all the duties of a ticket agent of the defendant, and the defendant is availing itself of his services for that purpose. The word "acting" must have been used in the statute for a purpose, and it seems to us that the essential thing, under the statute, is not the existence of a contract of service, but the actual performance of the duties of ticket agent for the railroad company. As bearing more or less on this question, see *Van Dresser v. Navigation Co.*, 48 Fed. Rep. 202; *Norton v. Railroad Co.*, 61 Fed. Rep. 618; *Railway Co. v. Novak*, 61 Fed. Rep. 573; *Railway Co. v. Bigelow*, 68 Ga. 219; *State v. Northwestern E. & L. Assoc.* 62 Wis. 174. We do not wish to be understood as intimating that scalpers or ticket brokers to whom a railroad company may furnish its tickets for sale would be its "acting ticket agents," within the meaning of the statute. The service in this case was made on the assistant ticket agent in the office, while performing its duties during the temporary absence of the head ticket agent, to whom, on his return, he delivered the copy of the summons. We think this service was regular, and, even if irregular, there was, under the facts, no ground for setting it aside on motion. *Railway Co. v. Novak, supra.* Order affirmed.

Wilson v. Duluth Street R. Co.

WILSON

v.

DULUTH STREET R. CO.

(*Supreme Court of Minnesota, May 11, 1896.*)

Stations on Street Railways.—In the charter of a street railway company, a provision referring to "stations at each end of the lines" *held* to mean stations at each end of the tracks, and not at each end of the run of particular cars.

APPEAL from municipal court of Duluth. *Affirmed.*

Thomas S. Wood, for appellant.

Allen & Baldwin, for respondent.

MITCHELL, J.—Defendant's charter (Sp. Laws 1881, Ex. Sess., c. 200) granted it the right to construct and operate a single or double track for a passenger railway, with all necessary tracks for turnouts, side tracks, and switches, in any of the streets of the village of Duluth and its suburbs, including New London and Oneota, and in the roads connecting the same. Section 15 of the act provides that its cars shall be run in conformity with the following, among other, rules and regulations: "(4) No car shall be left to remain standing on any street at any time unless the same is waiting for passengers or is unavoidably detained. (5) No car shall be allowed to stop on a cross walk or in front of any intersecting street except to avoid collision or to prevent danger to persons in the street or to take in or leave off passengers." "(10) No car shall remain standing on any of the stations more than ten minutes except at each end of the lines and the stations nearest the passenger depots of any other railway companies at which excepted stations they may stay a longer time." The court instructed the jury that "the end of the lines," as used in this tenth and last rule, "referred to the defendant's system as a system," and that the "termination of the line" meant simply the "termination of the system." The correctness of this definition of the expression "the end of

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the lines " is the only question presented by the record and the assignments of error. The defendant contends that a station at " the end of a line " means the station at the end of the run of any particular cars, while plaintiff contends that it means the station at the end of a particular track. While it is not entirely clear what the court meant by the word " system," yet it seems to be conceded or assumed by both parties that the instruction was in substantial conformity with plaintiff's present contention as to the meaning of the term " end of the line." A reference to the facts will illustrate the meaning of the parties: Defendant had two parallel tracks on Superior street, which were several miles long. It had a track on Fourth street which connected with the Superior street tracks at Third avenue west, three blocks distant from the point on the Superior street tracks at which the car in question was left standing more than ten minutes. This car was one of those called " 14th Ave. East Cars." One of the terminal points of the run of these cars was on the Superior street tracks between Fifth and Sixth avenues (the place at which the car in question was left standing), at which point, on their arrival, they were turned round, and then run back on one of the Superior street tracks to its connection with the Fourth street track, over which it ran to the other terminus of its run. The point however, on the Superior street track which constituted one terminus of the run of these Fourteenth avenue cars was not the end of the Superior street track. Defendant's contention, applied to the particular facts of the case, is that this point, being the end of the run of these particular cars, was a station at the end of the line, within the meaning of the statute, although not at the end of the track. Inasmuch as street railways usually have no " station," properly so called, but receive and discharge passengers at any point along the route of the cars, it is not entirely clear what the legislature meant by that term, especially as there is no other part of the act that tends to throw any particular light on the question. Neither is there anything in the act clearly and positively indicating what the legislature meant by the word " line." The act, as has been seen, authorizes the defendant to construct a single or double track on every street in the village (now city), thus enabling it to cover the streets with a network of tracks. There is nothing in the act to prevent the defendant from making the

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end of the "run" of any particular cars at any point on any street it sees fit. Conceding that cars must be run on schedule time, and that for the purpose of receiving passengers, and waiting for the arrival of the schedule time for its departure, it would be necessary for a car to be left standing longer at the terminus of its run than would be required at any intermediate point on its route, yet it is a matter of common knowledge that, under any ordinary circumstances, 10 minutes would be ample time for such purposes, even at the terminus of its run. We attach much importance to the length of time thus allowed, as tending to indicate what exceptions the legislature intended to make to the general rule. The end of a track will usually be out in the suburbs, where no great public inconvenience will result from allowing cars to stand in the street, and where circumstances might often require that they be allowed to stand longer than at other places. It might often be necessary for a car to stand longer than 10 minutes at or near a railway station, while waiting for passengers to arrive on incoming trains. These, we think, were the cases which the legislature must have intended to except from the general rule. Our conclusion, therefore, is that plaintiff's contention is correct, and that "stations at the end of the lines," in this statute, means stations at the end of the tracks. This being so, the instruction of the court, even if not verbally accurate, was, under the evidence, without prejudice. Order affirmed.

RATZER

v.

BURLINGTON, C. R. & N. Ry. Co.

(Supreme Court of Minnesota, April 24, 1896.)

Delivery of Goods by Carrier.—The shipper of goods consigned them to himself, and received a bill of lading from the railway company accordingly. The railway company delivered them, with a proper waybill, to the next connecting railway company, who, at the shipper's request, delivered the goods to him in transit at an intermediate point, without the surrender or cancellation of the bill of lading, which he thereafter, and before the goods would have arrived at their original destination if

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the transit had continued, pledged, in the usual course of business, to an innocent pledgee, for value. *Held*, the latter railway company is liable to the pledgee for failure to deliver the goods at the place of destination, and is estopped from showing such intermediate delivery to the shipper.

APPEAL from Hennepin county district court. *Reversed.*

J. F. McGee, for appellant.

A. E. Clarke and *W. F. Booth*, for respondent.

CANTY, J. — The Morrison Grain & Lumber Company shipped three car loads of oats, two from Britt, and one from Forrest City, Iowa, to New York City. One of these cars was shipped on January 5, and the other two on January 7, 1895. A bill of lading was issued for each car by the initial carrier. In each bill the shipper is named as consignee, with the addition, "Notify John Ratzer;" and the destination named is New York City. The initial carrier transported the cars to Livermore, Iowa, and there delivered them (with proper waybills, showing New York to be the destination) to the defendant, the next connecting carrier, with whom and a subsequent carrier it had through traffic arrangements. The defendant carried the cars on its line towards their destination until they reached Morrison, Iowa, on January 8th or 9th, and there delivered all of the oats (of the value of \$1,336) to the shipper, on its demand, without requiring a surrender or cancellation of the bills of lading. The shipper at this point converted the oats to its own use. Within a day or two after the oats were so delivered at Morrison, the shipper indorsed each of the bills of lading, "Deliver to the order of John Ratzer," and signed them. The shipper also drew drafts on said Ratzer, this plaintiff, in favor of the Bank of Reineck, for the amount of the purchase price of the oats, attached the drafts to the bills of lading, and delivered all of the same to the bank, who cashed the drafts in good faith, in the regular course of business, relying on the attached bills of lading. The bills of lading were, in the regular course of business, forwarded by the bank to New York, and presented to Ratzer, a commission merchant, there, dealing in grain, who on January 14 and 16, 1895, in the regular course of business, paid the drafts in good faith, relying on the attached bills of lading, which he then and there received. If the three cars of oats had continued to New York, their destina-

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tion, in the usual course of transportation, they would have arrived there between January 23d and 30th. The shipper, the Morrison Company, is wholly insolvent. Plaintiff brought this action to recover \$804.94, the amount so advanced by him on the faith of the bills of lading. The case was tried by the court below, without a jury. The court found all of the foregoing facts, and thereon ordered judgment for defendant. From the judgment entered thereon, plaintiff appeals, and urges, as a ground for reversal, that the judgment is not sustained by the findings of fact.

We are of the opinion that, on the facts found, the plaintiff is entitled to judgment. A vast portion of the produce of this country is moved from the agricultural districts to the commercial centers and the seaboard by the aid of advances made on the security of such bills of lading. A well-established custom has grown up in commercial circles by which such bills of lading are treated as the symbols of title to the property in transit, are taken as security for money advanced, and indorsed and delivered as a transfer of the property. This is well understood by the railroad companies and every one else. To allow the railroad companies to ignore this custom would be to destroy the custom itself. This would cause great hardship, revolutionize business methods, and drive all buyers and shippers of small means out of the business, as they could no longer give ready and available security on commodities in transit, and thereby turn their limited capital sufficiently quick and often to enable them to do much business. This, in turn, would destroy competition, and leave the business in the hands of a few concerns with unlimited capital. Neither have the railroad companies any right to ignore this custom. On the contrary, it must be held that these companies have been doing business with reference to this custom as much as the shippers themselves and the consignees, banks, commission merchants, and others who are continually advancing money on the faith of the security of these bills of lading. The effect of this custom, independent of section 7649, Gen. St. 1894, is to make bills of lading to some extent and for some purposes negotiable, and to give superior rights to innocent transferees for value in the usual course of business. It is hardly necessary to cite authorities to the general proposition that, when a bill of lading is outstanding, the railway company delivers the goods at its peril, without a pro-

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duction of the bill of lading; and, if it so delivers them to some one other than the *bona fide* holder for value of the bill of lading, it is liable to him for conversion of the goods. What limitations or exceptions there may be to this rule we need not now consider. The following authorities show the universality of the rule as applied to transportation both on land and by water. See *The Thames*, 14 Wall. 98; *North v. Transportation Co.*, 146 Mass. 315; *Forbes v. Railway Co.*, 133 Mass. 154, 9 Am. & Eng. R. Cas. 80; *Furman v. Railway Co.*, 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500; *City Bank v. Rome, W. & O. Ry. Co.*, 44 N. Y. 136; *Railway Co. v. Stern*, 119 Pa. St. 24, 35 Am. & Eng. R. Cas. 551; *Boatmen's Sav. Bank v. Western & A. R. Co.*, 81 Ga. 221; *National Bank v. Atlanta & C. Air Line R. Co.*, 25 S. C. 216; *Midland Nat. Bank v. Missouri Pac. R. Co.* (Mo.) 33 S.W. 521; *Armentrout v. Railway Co.*, 1 Mo. App. 158; *Gates v. Railway Co.* (Neb.) 60 N. W. 583; *Garden Grove Bank v. Humeston & S. R. Co.*, 67 Iowa 526; *Tindall v. Taylor*, 4 El. & Bl. 219. See also, as bearing on the question: *Halsey v. Warden*, 25 Kan. 128; *Meyerstein v. Barber*, L. R. 2 C. P. 38; *Lee v. Bowen*, 5 Biss. 154, Fed. Cas. No. 8,183; *Heiskell v. Bank*, 89 Pa. St. 155; *Bass v. Glover*, 63 Ga. 745; *Bank v. Dearborn*, 115 Mass. 219; *Dows v. Bank*, 91 U. S. 618; *Conard v. Insurance Co.*, 1 Pet. 386; *Weyand v. Railway Co.*, 75 Iowa 573, 9 Am. St. Rep. 512, note. In the case of *National Bank v. Chicago, B. & N. R. Co.*, 44 Minn. 224, it was held that the railroad company was not liable to the pledgee of the bill of lading. This was held solely on the ground that, as no grain was delivered to the agent of the railroad company when he delivered the bill of lading, he had no authority to issue it, and the company was not liable. That question is not involved in this case.

Respondent contends that the consignee is only obliged to produce the bill of lading, but not to surrender it when receiving the goods; and that as the Morrison Company held the bill of lading when the oats were delivered to it in transit, and it did not negotiate the bill of lading until afterwards, the defendant is not liable for so delivering the oats without requiring a surrender of the bill of lading. Whether or not the carrier can compel a surrender of the bill of lading when it delivers the goods it is not necessary here to decide. If

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the holder of the bill of lading insists on retaining it as a muniment of title, or for any other purpose, and has a legal right to do so, he can, at least, be required to produce it for cancellation, so that it will cease to be on its face a live bill of lading. And, in our opinion, it was the duty of the defendant at least to require this. It is immaterial that these bills of lading were negotiated to the bank and plaintiff after the oats were so delivered to the shipper. The bills were so negotiated before they had become stale, and even a considerable length of time before the oats would, in the ordinary course of transportation, have arrived at New York, their destination. The defendant permitted these bills to remain outstanding, with all the appearances of live, valid bills of lading. There was nothing to put any one dealing with the Morrison Company on his guard. The facts in the case are quite similar to those in the case of *Railway Co. v. Johnston*, (Neb.) 63 N. W. 144, where the defendant was held liable though the grain was delivered in transit at an intermediate point before the bills of lading were negotiated. In the case of *Wells v. Railway Co.*, 32 Fed. Rep. 51, the railway company was also held liable to the pledgee of the bill of lading for delivering the goods to the shipper in transit. In *Armentraut v. Railway Co.*, *supra*, the railway company was held liable to the transferee of the bill of lading for delaying the transportation at the request of the shipper for a few days after it had issued the bill, thereby causing damage to the goods. In *Tindall v. Taylor*, *supra*, it was held that after the carrier had received the goods and issued a bill of lading for them to the shipper, and before the transit had commenced, it was not liable for refusing to redeliver the goods to him without a surrender of the bill. It was the duty of the defendant to see that the bills of lading were canceled when it redelivered the oats to the shipper, and its failure to perform that duty enabled the shipper to perpetrate a fraud on the bank and plaintiff. It is a case, for the application of the doctrine of equitable estoppel, that, where one of two innocent persons must suffer by reason of the fraud of a third party, he by whose negligent act or omission such third party was enabled to commit the fraud ought to bear the loss. Under this rule, the defendant is estopped from showing that it delivered the goods to the shipper at the intermediate point,

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and is liable to plaintiff for failure to deliver them to him at the place of original destination. This disposes of the case. The judgment is reversed, and judgment ordered for plaintiff, pursuant to this opinion.

O'CONNELL

v.

ST. PAUL CITY R. CO.

(Supreme Court of Minnesota, May 21, 1896.)

Attempt to Cross in Front of Moving Street Car.—Where plaintiff attempted to drive in front of a street car moving 12 miles per hour, and only 40 feet away, *held* that he could not recover for injuries resulting from a collision.

APPEAL from Ramsey county district court. *Reversed.*

Munn, Boyesen & Thygeson, for appellant.

Stryker & Moore, for respondent.

COLLINS, J.—This action grew out of a collision on Selby avenue, in St. Paul, between plaintiff, who was driving a horse, attached to a wagon, in an easterly direction, and a grip car running westerly on defendant's cable line. The negligence attributed to defendant, according to the complaint, was in maintaining, at the point in question, a cable slit of an unusual and dangerous width and construction, in which plaintiff's horse caught his foot, and, while so caught, the employé in charge of the grip car ran into him, causing the injuries complained of. By the answer it was alleged that the injuries were caused solely because the horse suddenly and unexpectedly turned from his course, and jumped directly in front of the grip car as it was being propelled along the rails in the usual and ordinary manner. It was also alleged that the slit was not unusually or dangerously wide, or of unusual or dangerous construction, and, further, that the horse was not caught in the slit. At the trial two special questions were submitted to the jury,—the first, was the horse caught in the cable slit? the second, did the horse suddenly

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and unexpectedly turn from his course, and jump in front of the car? Both of these questions were answered in the negative, and then the jury returned a general verdict for plaintiff, but in a ridiculously small amount, if he was entitled to recover at all. By reason of the negative answer to the first of these questions, one very important feature has been eliminated from the plaintiff's case. The defendant has thereby been relieved of the consequences of a charge that the cable slit was unusually and dangerously wide, and when examining the evidence for the purpose of passing upon the contention of defendant's counsel that, from plaintiff's own testimony, it appeared that defendant's employes were not negligent in any degree, and also that it was conclusively established that plaintiff was guilty of contributory negligence, his court is relieved from a consideration of testimony tending to show that the horse did catch one of his front hoofs in the slit, and was unable to move. Thus stripped, the evidence, construed most favorably for plaintiff, was as follows: He was well acquainted in the locality; knew about the movements of the cable cars, and the method of handling. He knew at what rate of speed the cars usually ran,—about 12 miles an hour,—and supposed the car which struck his horse was running at about that rate. He knew that sometimes the calks upon horses' shoes would catch in the slit, and “made it a point to walk across the cable track. I had been caught two or three times.” While driving east, in broad daylight, on the north side of the track, at a sharp trot,—about eight miles an hour,—he saw the car approaching, when it was some distance away; and then he turned his horse to cross diagonally to the south side of the track, slackening the speed of his horse as he turned. When asked to state the distance from the car to himself when he started to cross, his answer was, “Well, I couldn't tell, any more than what I had always considered a safe distance.” Upon being pressed for a further estimate of the distance, he replied, “Well, I should put it about seventy-five to one hundred feet.” The plaintiff also gave it as his opinion that when the horse first reached the rails the car was from 50 to 60 feet away, and, further, that about two seconds of time would have then been required for crossing and clearing the path of the approaching car. So that, according to his version of the occurrence, plaintiff undertook to effect a crossing which would consume two seconds, if he moved along

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without delay, while the car—running upon a fixed track, and unable to deviate therefrom—passed over ground which it would cover in four or five seconds, as plaintiff well knew. To put it in another form, the car would be at the crossing point in four or five seconds, and plaintiff deliberately took the chances of driving his horse and wagon in front of it, in occupying its pathway for half that time, and in safely escaping a collision. And this was without any real or pressing necessity, for the only reason given by plaintiff for crossing the track at all, was that when he saw the car, 75 or 100 feet distant, there was a pair of horses, drawing a wagon, about abreast of the car, coming towards him on a walk, and on the same side of the track, and that he crossed to avoid meeting the car and the team at the same time,—a thing which would not have naturally occurred, for the car, running 12 miles an hour, would have passed the walking team and the wagon long before the latter and plaintiff's horse met. And, even if this were not the case, common prudence would have suggested that plaintiff stop his horse where he was until the car had passed him, rather than depend upon two or three seconds of time, which he might have, as a margin, should he cross the track without being delayed. But the finding of the jury that the horse was not caught in the slit, taken in connection with the fact—which stands admitted—that he was struck by the car on the left fore shoulder, and therefore before he had more than fairly gotten upon the track, shows quite conclusively that, when plaintiff attempted to drive across, the car was much nearer than he anticipated, and was almost upon him. In fact, if the horse did not stop of his own accord, or, for some unexplained reason, was not stopped by its driver, he walked no more than 8 or 10 feet after he was turned from his course before the collision came. So, if we assume that he walked rapidly,—say at the rate of 3 miles an hour,—the car could not have been to exceed 40 feet distant when plaintiff first started the animal in the direction of the track. It seems evident that plaintiff placed himself, according to his own story, in a place of great danger, and that the proximate cause of the collision was his own negligence. For that reason the verdict cannot stand. Order reversed, and a new trial granted.

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ENGLISH *et al.*

v.

SOUTHERN PAC. CO. *et al.*

(*Supreme Court of Utah, May 27, 1896.*)

Compliance with Statute in Regard to Signals Does not Exempt from Negligence.—Notwithstanding the statutes of Utah provide that railroad companies crossing streets and thoroughfares shall ring the locomotive bell and sound the whistle, yet this statute will not relieve the railroad company from the charge of negligence in failing to adopt such other reasonable measures for public safety as common prudence may dictate, considering the danger, locality, travel, and surrounding circumstances. The rule is founded in common law that every one must so conduct and use his own property as, under ordinary circumstances, he will not injure another, if the injury can be avoided by the use of reasonable care.

Railroad Crossings in Cities.—The vigilance and care to be used at public crossings in populous cities where many tracks are built and used across a public thoroughfare, and the crossing is in nearly constant use, is greater than at ordinary road crossings in country places or small and less populous localities; and the care to be used must depend upon the facts. And in crossing a thickly populated street, which is almost constantly in use in a large city, where traveling across it is dangerous, reasonable care and prudence on the part of the railroad company requires it to provide, at such crossing, flagmen or gates during the time the tracks are in use, so as to lessen the danger caused by the almost constant use of the tracks in operating and switching trains across the street; but this care need not be observed in country districts or smaller localities, where but few pass each day, and the probable danger is thereby much lessened.

Evidence as to Danger of Crossing.—Testimony showing the danger of the crossing, and its locality and use in populous localities, was proper to be submitted to the jury, as bearing upon the question of negligence of the company in not providing flagmen or gates at such crossing, to protect travelers, under guarded instruction from the court.

Evidence as to Names and Ages of Children.—Where the widow of deceased was called as a witness, it was competent for her to state the names and ages of the children of the deceased; and especially so as they were all parties to the action.

Damages for Death Caused by Negligence.—In an action for damages in causing death by negligence, the law allows nothing more than the pecuniary loss, as shown by the proof, and measured by pecuniary standard. The extent of the loss should not be measured by the wealth or poverty of the recipient or giver, but by his earnings, care, health, beneficent and pecuniary contributions given, or in reasonable expectation of being given, to the widow and children, as shown by the proof, and judged

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from all the circumstances of the case to be just, but measured by a pecuniary standard.

Same.—Where the deceased was 38 years old, in good health, and earning \$50 per month, which he contributed to the support of his wife and 7 children, the eldest being 17 years of age, and it appears that his expectancy of life was 29 years, *held* that, under the rule of law, \$15,000 or \$13,000 damages were excessive, and that the damages should be reduced to \$10,000, and judgment modified accordingly; this action being brought, and appeal taken, before the state was admitted into the Union.

APPEAL from Weber county district court. *Modified.*

Marshall & Royle and *P. L. Williams*, for appellants.

Evans & Rogers and *A. G. Horn*, for respondents.

MINER, J.—This action was brought to recover damages arising from the alleged negligence of the defendants, in causing the death of William English, deceased. Upon a trial, the jury found a verdict for the plaintiffs in the sum of \$15,000. Upon a motion for a new trial, the verdict and judgment were reduced to \$13,000.

It appears that on November 21, 1894, the defendants owned and controlled numerous railroad tracks crossing Twenty-fourth street, in the city of Ogden; that the depot and grounds of the companies consisted of 60 acres of land, at which point numerous railroad tracks center; that during nearly every hour of the day, and at times almost continually, the three different railroad companies were moving their trains upon the tracks across Twenty-fourth street, running north and south, to and from the depot. Twenty-fourth street is a well-settled and much-traveled street, near the central part of the city, consisting of about 15,000 people. Prior to the date of the injury complained of, the defendants had never stationed a flagman at the crossing to warn those using the street of the approach of trains, which were almost constantly passing and switching their trains and cars across the street, and no gates were ever erected, or other precautions used, to warn the numerous traveling public of the danger, except the ringing of the bells, and the blowing of the locomotive whistles, as the trains passed over the crossing. At the time of the accident, the Rio Grande Western Railroad Company were switching an engine and three cars from the ice-house switch, going northward across Twenty-fourth street. While doing so, the deceased, William English, was traveling west, across Twenty-fourth street, with a horse and express wagon.

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He stopped a few feet east of the Rio Grande track and train, until it cleared the center of the street, just north, where it remained close to the street. At this time the Southern Pacific train, consisting of seven cars, started about a mile north of Twenty-fourth street, and pushed a train of seven cars towards Twenty-fourth street. The Rio Grande train obstructed the view of the deceased so far as the movements of the Southern Pacific train were concerned. Without seeing the Southern Pacific train, the deceased started to drive across the track No. 1, in the rear of the hind car of the Rio Grande train, standing on the track. As he crossed track No. 1, and came upon track No. 2, nine feet to the west of it, the Southern Pacific train backed up at the rate of five or six miles per hour, and he was struck by the rear end of the Southern Pacific train, and crushed under the wheels of the cars. He died from such injuries shortly thereafter. The accident occurred about 4 o'clock in the afternoon of a clear day. Several witnesses testify that the Southern Pacific train bell was rung, and the whistles sounded, many times; while other witnesses say they heard bells and whistles and other noises, but did not hear the Southern Pacific bell or whistle. When the deceased was taken from under the cars, he remarked that he did not see the train coming. Before the deceased reached track No. 2, he inquired of Mr. Couch, a switchman on the Rio Grande train, and said, "Can I cross now?" The switchman answered, "No; do no try to cross." Deceased drove on afterwards, and was injured. At this time, witness states that he did not see the Southern Pacific train, but had heard its whistle before. Witness further states, "I do not think English could see the Southern Pacific train from the wagon where he was. He was 30 or 40 feet from me. I could not say whether deceased heard me or not." Another witness says that Couch halloed to English, as he went upon the track, but did not hear anything said. Testimony was also introduced tending to contradict the testimony of Couch. Page testifies that he was present and saw English come out from behind the Rio Grande cars, and, when his horse was upon track No. 2, said to him, "'For God's sake, Bill, what are you doing there?' English jerked up his horse, and let loose of the lines, as if to jump out. Could not say as English heard me. It was all done in a moment. At this time the rear car struck him." Deceased,

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at the time of his death, was 38 years old, of good health and habits, never used liquor or tobacco, and weighed 165 pounds. He was earning \$50 per month, and contributed his earnings to the support of his family, consisting of a wife and 7 children, the oldest child being 17 years of age. He was shown to be a kind and affectionate husband and father. According to the American mortality table, it appears that his expectation of life was 29 and $\frac{62}{100}$ years. His funeral expenses amounted to \$105. He was familiar with the street crossings and the conduct of the train.

The appellants contend that the deceased contributed to cause the injury and death complained of, by his own negligence and want of ordinary care. It was the duty of the deceased to have looked and listened, and to have done everything that a prudent man would do, before he attempted to cross the track at the place in question. This crossing was one in use by the several railroad companies every hour in the day in the arrival and departure of trains, and in switching cars across, to and from the depot, and from the several freight departments located near by. At the time in question, the wind was blowing hard, several bells were being rung and whistles sounded in different parts of the yard; and deceased's position behind the Rio Grande cars was such that it might not have been possible for him to see the train backing up, or to hear the bell from that locomotive. The crossing, as shown by the proof, was one more than ordinarily dangerous; and in order to cross over it at all, in the absence of a gate or flagman, one must wait until the trains are all out of the way, or run the risk of being injured by the many trains constantly backing up, and crossing and recrossing this locality. When crossing this network of numerous railroad tracks, the utmost vigilance is not always sufficient to protect one from danger. If a traveler looks in one way to avoid danger, he frequently encounters it from a direction least expected. We think the question of contributory negligence on the part of the deceased was properly submitted to the jury.

Plaintiffs introduced evidence upon the subject of the negligence of the defendants in not providing a flagman or gates at this crossing, to prevent travelers crossing this track from being exposed to injury, and upon that subject the court instructed the jury as follows: "The second matter of negligence that is alleged is a failure to provide a switchman or

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flagman at this crossing, or to provide gates which should be closed and opened, so as to prevent passengers upon the highway from being exposed to danger. The plaintiffs claim that under the facts and circumstances developed in this case, that this became a duty which the defendants owed to the traveling public. * * * The terms, 'neglect,' 'negligence,' 'negligent,' 'negligently,' import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. Now, just simply apply that rule, gentlemen, to the facts in this case, and you can by that determine whether or not the defendants have been guilty of negligence in this matter. Did their conduct in operating this railroad track crossing, this highway, under all the circumstances and facts that have been detailed in evidence, import a want of such attention to the nature and probable consequences of their acts as a prudent man ordinarily bestows in his own concern? If it does, if there was such a want, then there is negligence, and it constitutes a ground of complaint on behalf of any person who is injured by reason of it. As to what a prudent man would do under the circumstances, gentlemen, is for you to determine, and you are to determine it for yourselves." To the introduction of evidence upon that subject, and to the charge of the court thereon, the defendants assign error.

The statutes of Utah only impose upon railroad companies the duty of ringing the bells and sounding the whistles upon the approach of trains at public crossings, and the appellants contend that, if the defendants performed the statutory requirement before reaching the crossing, no additional duty was imposed under any circumstances, to prevent injury. This question is surrounded with much difficulty and many conflicting decisions. In discussing it, we must remember that this crossing is over one of the main streets and avenues of travel in Ogden city, about three blocks from the business portion of the city, containing 15,000 people, and that the street is well settled; that farmers and the traveling public are almost constantly passing over the crossing. Numerous railroad tracks of the three railroad companies cross this street, and engines and cars are very frequently, and almost constantly, passing and being switched one way or the other over this street.

Compliance with statute in regard to signals does not exempt from negligence.

In the case of *Railway Co. v. Ives*, 144 U. S. 419, 55 Am.

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& Eng. R. Cas. 159, where this question was raised, the trial court charged the jury as follows: "So if you find that because of the special circumstances existing in this case, such as that this was a crossing in the city, much used, and necessarily frequently presenting a point of danger, where several tracks run side by side, and there is consequent noise and confusion and increased danger,—that owing to the near situation of houses, barns, fences, trees, bushes, or other natural obstructions, which afforded less than ordinary opportunity for observation of an approaching train, and other like circumstances of a special nature, it was reasonable that the railroad company should provide special safeguards to persons using the crossing in a cautious manner,—the law authorizes you to infer negligence on its part for any failure to adopt such safeguards as would have given warning, although you have a statute in Michigan which undertakes, by its provisions, to secure such safeguards in the way such statute points out. The duty may exist outside the statute to provide flagmen or gates or other adequate warning appliances, if the situation of the crossing reasonably requires that,—and of this you are to judge,—and it depends upon the general rule that the company must use its privilege of crossing the streets on its surface grade with due and reasonable care for the rights of other persons using the highway, with proper care and caution on their part." And the supreme court held this instruction in harmony with the general rule of law in most of the states and at common law, continuing as follows: "The general doctrine is well stated in *Railway Co. v. Kuhn*, 86 Ky. 578, as follows: 'The doctrine with reference to injuries to those crossing the track of a railway, where the right to cross exists, is that the company must use such reasonable care and precaution as ordinary prudence would indicate. This vigilance and care must be greater at crossings in a populous town or city than at ordinary crossings in the country. So what is reasonable care and prudence must depend on the facts in each case. In a crossing within a city, or where the travel is great, reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury; but such care would not be required at a crossing in the country, where but few persons passed each day. The usual signal, such as ringing the bell and blowing the whistle, would be sufficient.' Citing *Thomp. Neg.* 417; *Railroad Co. v. Goetz*,

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79 Ky. 442, 14 Am. & Eng. R. Cas. 627. And it was accordingly held in that case that a railroad company which had failed to provide a flagman or gates, during the night-time, when many trains were passing, at a crossing in a thickly-populated portion of the city of Louisville, buildings being situated near the track at that point, was guilty of negligence of the most flagrant character. See also, to the same effect, Railroad Co. v. Dunn, 78 Ill. 157; Bentley v. Railway Co., 86 Ala. 484; Railroad Co. v. Young, 81 Ga. 397; Troy v. Railroad Co., 99 N. Car. 298; Bolinger v. Railroad Co., 36 Minn. 418, 29 A. & Eng. R. Cas. 408." Commenting upon this case, the supreme court further says: "It is also held in many of the states (in fact, the rule is well-nigh, if not quite, universal) that a railroad company, under certain circumstances, will not be held free from negligence, even though it may have complied literally with the terms of a statute perscribing certain signals to be given, and other precautions to be taken by it, for the safety of the traveling public at crossings. Thus, in Railroad Co. v. Perkins, 125 Ill. 127, it was held, that the fact that a statute provides certain precautions will not relieve a railroad company from adopting such other measures as public safety and common prudence dictate." Citing Thompson v. Railroad Co., 110 N. Y. 636. The reasons for such rulings is found in the principle of the common law that every one must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another in any way. As a general rule, it may be said that whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous, is a question of fact for a jury to determine, under all the circumstances of the case, and that the omission to station a flagman at a dangerous crossing may be taken into account as evidence of negligence, although in some cases it has been held that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous,—as, for instance, that it is in a thickly-populated portion of the town or city; or that the view of the track is obstructed, either by the company itself or by other objects proper in themselves, or that the crossing is a much-traveled one, and the noise of

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approaching trains is rendered indistinct, and the ordinary signals difficult to be heard, by reason of bustle and confusion incident to railway or other business; or by reason of some other such like cause,—and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country. The following cases are illustrative of various phases of the rules we have just stated: *Eaton v. Railroad Co.*, 129 Mass. 364, 2 Am. & Eng. R. Cas. 183; *Bailey v. Railroad Co.*, 107 Mass. 496; *Railroad Co. v. Matthews*, 36 N. J. L. 531; *Railroad Co. v. Killips*, 88 Pa. St. 405; *Railroad Co. v. Richardson*, 25 Kan. 391; *State v. Philadelphia, W. & B. R. Co.*, 47 Md. 76; *Welch v. Railroad Co.*, 72 Mo. 451; *Frick v. Railroad Co.*, 75 Mo. 595; *Railroad Co. v. Yundt*, 78 Ind. 373; *Hart v. Railway Co.*, 56 Iowa, 166; *Kinney v. Crocker*, 18 Wis. 74.

From these authorities, it is clear that, while the statutes of Utah make some provision for the safety of the public while crossing tracks when crossing over the public thoroughfares in thickly-settled communities or cities, yet these statutes will not relieve the railroad company from adopting such other reasonable measures for the public safety as common prudence may dictate, considering the danger, locality, travel, and surrounding circumstances of the case. The reason of such rule is founded in the common law that every one must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another in any way, if such injury can reasonably be avoided by the use of reasonable care. The vigilance and care to be used would be much greater at public crossings in populous cities and towns, where

many tracks are built across the streets, and are constantly in use, than the ordinary road crossings in the country, or less populous and less used localities; so that the reasonable care and prudence to be used must depend upon the facts of each case. In the crossing of this particular street, where the travel is shown to be great, and the danger in crossing to be greater, we are of the opinion that reasonable care and prudence would require that a flagman be kept constantly at the crossing during the time that trains continue to cross over it, or that gates should be erected and controlled so as to lessen the danger of injury to passengers and travelers, and thus lessen the danger caused by the almost constant use of the tracks by the

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defendants and their trains. And, while this is true of this particular crossing, we are not of the opinion that these precautions should be observed by railroad companies in country districts, cities, or smaller localities, where but few persons pass each day, and where the probable danger would be much lessened. *Freeman v. Railroad Co.*, 74 Mich. 86; *Railway Co. v. Ives*, 144 U. S. 408, 55 Am. & Eng. R. Cas. 159.

We are of the opinion that the testimony was properly admitted, and concur with the jury that the defendants were negligent in not maintaining gates or providing a flagman at the crossing in question, and the court committed no error in giving the instructions to the jury.

Evidence as to
danger of
crossing.

We are equally convinced that no error was committed in allowing the plaintiff Jane English to give the names and ages of the children of the deceased. They were all parties to the action, and such testimony was proper even if they were not parties to the action, as this court held in *Pool v. Pacific Co.*, 7 Utah 303; and *Chilton v. Railway Co.*, 8 Utah 47.

Evidence as to
names and
ages of
children.

Appellants also contend that the damages awarded the plaintiffs were excessive. The jury rendered a verdict for \$15,000, and the court, on motion for a new trial, reduced the damages to \$13,000. The deceased was 38 years old, with an expectancy of life, under the American table, of 29 and $\frac{62}{100}$ years, and was earning \$50 per month, as driver of an express wagon.

Damages for
death caused
by negligence.

The jury were called upon to fix the pecuniary loss of the plaintiffs by reason of the death in question. Appellants claim that, according to the American Experience Table, the value of a life at 38 would be \$9,546; that, according to the interest table issued by the Mutual Life Insurance Company, the insurable value of a healthy man of 38 years would be, at 6 per cent, \$8,214. \$10,000 placed at interest, at the legal rate of 8 per cent, would amount to \$800 per year, or \$200 more than the deceased was earning. The law will allow nothing more than the pecuniary loss as shown by the proof, and measured by a pecuniary standard. The extent of this loss should not be measured by the wealth or property of the recipient or giver, but by his earnings, care, health, beneficent and pecuniary contributions given, or in reasonable expectation of being given, to the widow and children, as

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shown by the proof, and judged from all the circumstances of the case to be just, but measured by a pecuniary standard. *Pool v. Railroad Co.*, 7 Utah 310; *Chilton v. Railway Co.*, 8 Utah 47. Under the circumstances of this case, we are of the opinion that the damages and judgment are excessive to the amount of \$3,000, and should be reduced to the sum of \$10,000; and that judgment should be entered for that amount accordingly, with costs in addition thereto. The judgment of the district court is modified accordingly, and that court is directed to set aside the judgment herein, and enter judgment in favor of the plaintiffs, and against the defendants, for the sum of \$10,000 and costs.

ZANE, C. J., and BARTCH, J., concur.

WHERRY

v.

DULUTH, M. & N. RY. CO.

(*Supreme Court of Minnesota, May 14, 1896.*)

Incurring Apparent and Imminent Danger.—The fact that a danger is known will preclude a recovery in case of injury, where such danger is apparent and imminent, and of such a character as to impose upon one who undertakes to pass it a hazard that an ordinarily prudent man would not incur. A person has no right to cast himself upon a known danger, when the act subjects him to immediate and great peril.

Case at Bar.—The plaintiff approached a street crossing, and found it blocked by a freight train. It was apparent that the train was liable to start at any moment. After waiting at least 20 minutes, plaintiff attempted to cross by climbing up between the cars, some 250 feet from the engine, and was injured by the sudden backing up of the train, no signal or warning having been given. *Held*, under all of the facts of this case, that plaintiff was guilty of contributory negligence, as a matter of law, which would prevent a recovery.

Reckless Act not Justified by Fact that Others have Performed it.—That other men have attempted or performed reckless and negligent acts of a certain character cannot be allowed to justify or excuse one who attempts or performs the same reckless and negligent act.

Knowledge of Plaintiff's Danger.—*Held*, further, that there was no evidence which would have justified the jury in finding that the employé who backed the train knew at the time that plaintiff was in a dangerous place, or had reason to suppose that he was attempting to cross the train.

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New Trial.—*Held*, also, that the trial court did not err when refusing to grant plaintiff's motion for a new trial on the ground of newly-discovered evidence.

APPEAL from St. Louis county district court. *Affirmed.*

Geo. L. Spangler, for appellant.

Cotton, Dibell & Reynolds, for respondent.

COLLINS, J.—This was an action brought to recover for injuries said to have been caused by the negligence of defendant's servants while in charge of one of its freight trains at Virginia, in this state. At this point the track ran north and south, while Chestnut street crossed it at right angles. About 5 o'clock in the afternoon of the day in question, plaintiff, on foot, approached this crossing from the west, on his way to a point easterly, a mile or two beyond the crossing, and found the train obstructing the way, the engine headed to the south. It had been at a standstill at this point for several minutes, and it was shown upon the trial that during the time defendant's trains had been running to this point (about three months) it had been the common practice to blockade this crossing with cars for 20 or 30 minutes at a time, and that, while some pedestrians went around the obstructions, others climbed over or crawled between the cars. After waiting a few minutes, standing at a distance of some 30 feet from the train, and over 250 feet from the engine, plaintiff stepped forward, and attempted to climb up between a flat and a box car. While engaged in so doing, the train was suddenly, and without signal or warning, it was claimed, backed up, catching and crushing one of plaintiff's feet. When counsel rested plaintiff's case upon the trial, it was dismissed by the court, upon the ground that he was guilty of contributory negligence, and thereafter a motion for new trial was denied. The plaintiff was a man 33 years of age, fully capable of exercising due care and caution in respect to his personal safety. That the street was blockaded by the train did not warrant his attempt to pass over the cars. It might have been inconvenient for him to wait until the train moved, or to go around, a part of the way, on a street which paralleled the track, or, for the whole distance, on the right of way. That the snow was two or three feet deep, and somewhat concealed excavations on the right of way, into which he might

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fall, was no sufficient excuse for his adoption of an extremely hazardous and much more dangerous manner of passing the obstruction, although such obstruction was unlawful. His reason for attempting to climb over the train, instead of going around, does not relieve him of the charge of being reckless. The fact that a danger is known will preclude a recovery, in case of injury, when it is apparent and imminent, and of such a character as to impose upon one who undertakes to pass it a hazard that an ordinarily prudent man would not incur. One has no right to cast himself upon a known danger, where the act subjects him to immediate and great peril. Now the risk and peril in attempting to pass over the cars in question was easily appreciated and understood by any person of mature years. The plaintiff had seen a person in the cab of the engine, whom he supposed to be the engineer, and he had also seen a brakeman on the top of the cars. The train was headed southerly, in the only direction trains ran, for Virginia was the northern terminus of the road, and the engine stood several rods north of the depot. The crossing had been blocked for a much longer time than was permissible under the statute, and plaintiff had waited, momentarily expecting the train to start. It was apparent that it might start at any time, and, if it should, the risk and danger was open and notorious. On these facts it must be declared that there was a want of ordinary care upon plaintiff's part, contributing to the injuries received, as a proximate cause thereof, without which the injuries would not have occurred. The plaintiff was guilty of contributory negligence as a matter of law. It has repeatedly been so held under like circumstances. *Lewis v. Railroad Co.*, 38 Md. 588; *Andrews v. Railroad Co.*, 86 Ga. 192; *Railway Co. v. Pinchin*, 112 Id. 592, 31 Am. & Eng. R. Cas. 428; *Railroad Co. v. Copeland*, 61 Ala. 376; *Howard v. Railroad Co.*, 41 Kan. 403, 37 Am. & Eng. R. Cas. 552; *Corcoran v. Railway Co.*, 105 Mo. 399; *O'Mara v. Canal Co.*, 18 Hun. 192. See, also, 2 Ror. R. R. 1130. There was evidence to the effect that on different occasions, when the crossing had been blocked prior to this time, travelers on the street had climbed over the cars in the presence of trainmen. There was no proof that any of the crew having charge of this particular train had ever seen this done, or had any knowledge of such acts, and in this respect, as in others, the case is essentially

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different from that of *Henderson v. Railroad Co.*, 52 Minn. 479. That other men have attempted or performed reckless and negligent acts of a certain character cannot be allowed to excuse or justify one who attempts or performs the same reckless and negligent acts. The only bearing such evidence could have upon the facts in this case was that given it in *Henderson v. Railroad Co.*, where it was received for the purpose of showing that defendant's engineer, having actual knowledge of the practice, should have exercised a greater degree of care when starting up, for he might reasonably expect that the practice still prevailed, and that persons were then engaged in climbing over the cars. But, as before stated, there was an entire absence of evidence which tended to show that the men having charge of this train knew, or had reason to suppose, that people crossed the cars while they blocked the street at this point.

Reckless act
not justified
by fact that
others had
performed it.

It has been urged that it was for the jury to determine from the evidence whether the employé who set the train in motion saw the plaintiff when he boarded the cars, or at a time when he might have reason to suppose that plaintiff intended to cross over, and for that reason the court erred in its order of dismissal. We have carefully examined all of the evidence upon this point, and it seems very clear that there was none which would have warranted a finding that any of the trainmen saw the plaintiff on the cars, or in the act of getting on, or engaged in any act which would indicate that he had any intention to cross the train. The plaintiff, after testifying that while standing in the street, before he started to go upon the cars, he looked towards the engine, and saw the engineer, was asked, "Where was he?" The answer was, "He was looking out of the cab window,—looking back at me." Evidently the plaintiff himself made no claim that the engineer was looking back when he started to go upon the cars, but rather that he had previously looked in that direction. Another witness (Tucker) stated that he saw the engineer "leaning out of his cab window, looking towards the street, towards the north, lengthwards of the train." But Tucker stood at the depot 200 feet or more south of the engine, while plaintiff was about the same distance north; so that, when the engineer looked north, his back must have been towards Tucker, and the

Knowledge of
plaintiff's
danger.

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latter was not in position to state with any accuracy which way the engineer looked. A conclusion that the engineer saw the plaintiff when going towards or climbing up on the cars, based upon Tucker's testimony, could not be allowed to stand. The witness Richards testified that he saw the engineer looking up that way " before Wherry undertook to get in there," while the witness Cook stated that he saw the engineer looking back towards the north " four or five minutes " before the train started up; and this was all of the evidence tending to show that the engineer had any knowledge of plaintiff's whereabouts when he started the train.

Among other grounds on which plaintiff moved for a new trial was that of newly-discovered evidence, based upon cer-

New trial. tain affidavits, the only one of any consequence being that of McDonald, the fireman upon the engine at the time plaintiff was injured. The substance of his affidavit was that the regular engineer was temporarily absent from the cab, when a brakeman signaled for the train to back up, and that he, the affiant, reversed the engine without any warning, although he knew that plaintiff was then trying to cross the train at the street. These statements reflect very seriously upon the character of the man who made them, for if they are true it is evident that he did not hesitate to take the chances of inflicting a wanton injury upon the plaintiff, by reversing the engine without giving notice that the train was about to be moved. But on the hearing of this motion it was established beyond doubt that McDonald, in the presence of several witnesses, had repeatedly related what he claimed were the facts surrounding the accident, but entirely at variance with the statements found in his affidavit. He was completely impeached. It was also shown that, shortly before he made the moving affidavit, he had been dismissed from defendant's employ, and also that he was present at the trial, was well acquainted with the plaintiff, and that they were often seen in conversation during the trial. The plaintiff made no denial as to the acquaintanceship or the conversations, and admitted that at the time of the trial he knew that McDonald was the fireman upon the engine when the injuries were inflicted. He offered no explanation of an apparent lack of diligence, except that McDonald, pending the trial, would not tell what his testimony would be should he be placed upon the witness stand. It is not claimed that

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plaintiff or his counsel were misled in any manner by McDonald. It was certainly laches on plaintiff's part not to have examined the fireman as a witness, when he had the opportunity, if he was anxious to elicit the truth; and, if he dared not to trust him then under oath, we cannot now relieve him, that he may experiment with the witness at another trial. *Taylor v. Mueller*, 30 Minn. 343.

We do not consider it necessary to discuss other assignments of error. Judgment affirmed.

HALL

v.

OGDEN CITY ST. RY. CO.

(*Supreme Court of Utah, April 1, 1896.*)

Case at Bar.—Plaintiff emerged from an alley way, driving his team into an open street, upon which defendant ran its car. Immediately after leaving the alley, he looked in the direction from which the car came, and, in consequence of trees and poles, saw none, and then approached the track. Before crossing it he made no particular effort to see whether a car was coming, and it was possible that the poles might have obstructed the view between him and the car. The car was running at the rate of 25 or 30 miles an hour, and no gong was sounded until just before the collision occurred in which plaintiff was injured. *Held*, that a nonsuit was improperly granted.

Rights of Street Railway Company in Public Street.—A street-railway company has no superior right on a public street to that of the public at large, except the right to lay its track and operate its cars; and if it adopts a dangerous propelling power it must be held to a degree of care proportionate to the increase of danger to the public.

Rule where Street Car Meets Person or Vehicle.—A street car has the right of way in case of meeting a person or vehicle, but each party, in order to avoid accident, must exercise ordinary care and such reasonable prudence as the surrounding circumstances require; and what may be considered ordinary care in one case may amount to culpable negligence in another. The existence of negligence in each case must depend on the circumstances peculiar to it.

Duty of Motorman.—It is the duty of a motorman to notice whether or not the track is clear when he approaches a public crossing, and to sound the gong as warning.

Ordinance in Respect to Speed of Street Car.—While some courts hold that, where the speed is greater than that permitted by the ordinance, it is negligence *per se*, yet the better rule appears to be that it is a cir-

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cumstance from which negligence may be inferred, and is always proper to be considered by the jury.

Care Required of Persons Traveling in Public Street.—Persons traveling on a public street, along or across a street, are not held to the exercise of the same degree of care as when traveling along, or upon, or across an ordinary steam railroad.

Rule where Both Parties are Negligent.—When the injured party was negligent in the first instance, such negligence will not defeat his action, if it be shown that the defendant might have avoided the injury by the exercise of ordinary care and reasonable prudence.

Questions of Law and Fact.—As to whose negligence was the proximate cause of the accident is a question of fact for the jury.

APPEAL from Weber county district court. *Reversed.*

Maloney & Perkins and *Rhodes & Tait*, for appellant.

Evans & Rogers, for respondent.

BARTCH, J.—This suit was brought in consequence of alleged carelessness of the defendant company, which resulted in personal injury to the plaintiff. When the evidence had been introduced, the court granted a motion for a nonsuit, on the ground that the plaintiff was guilty of contributory negligence, and afterwards denied a motion for a new trial. These rulings are assigned as error on appeal. At the time of the accident the defendant was operating a street-car railway in the city of Ogden, and the injury was caused on its line on Washington avenue where it intersects with First street. The plaintiff had delivered a load of hay to one Anderson, and on his return passed through a private alley, just north of First street, over the sidewalk, which is one rod wide, on to said avenue, which is eight rods wide, and then, turning slightly to the south, continued across the eastern portion of said avenue in a westerly direction, and turned his horses to cross the defendant's track, when the collision occurred. Extending north from First street there, is a row of shade trees at the edge of the sidewalk on the avenue, and electric poles, about 100 feet apart, on the middle thereof, and the car track is on the west side of the electric poles. These trees and poles obstruct, from the sidewalk, the view to the north, where the car in question came from; and just after the plaintiff, who was driving slowly, and sitting on the front end of his hayrack on the wagon, had left the sidewalk, he looked to the north and south for a car, without seeing any, but did not look immediately before attempting to cross. When near the track, the electric poles somewhat obstructed

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the view of the plaintiff to see the car. There is some conflict in the evidence as to how far the car was from the wagon when the gong was sounded. The plaintiff testified that he heard no gong, and had no knowledge of the car's approach until it struck him. The witness Anderson, who was in the best position to see, said the car was not more than from 5 to 8 feet from plaintiff, and two other witnesses that it was not more than 50 or 60 feet from him when the gong sounded. The car at the time was running at the rate of 25 to 30 miles per hour, and, no brakes being set, or any effort made to stop, it struck with full force, demolishing the wagon and hayrack, killing one horse, and severely and permanently injuring the plaintiff. The wagon and team were dragged about 50 feet after being struck. The accident happened at the crossing on First street, which, however, is not a laid-out street west of the avenue, but it is open, and the public cross through there, it being a short way to Harrisville avenue. The railway track, to the north of the place of the accident, is straight, with no obstruction to the view except the electric poles. The plaintiff knew that the cars were running regularly about every 15 minutes. The accident happened on the 10th of August, 1893, at 5.30 P. M., it being a calm and clear day. Such is the testimony, in substance, disclosed by the record. The plaintiff also offered in evidence a city ordinance, to show the rate of speed which was allowed on railroads in Ogden City; but this was rejected by the court on the ground that it was incompetent, irrelevant, and immaterial. Counsel for the appellant insists that the court erred in rejecting the ordinance, and we are inclined to sustain their contention. It was admissible, unless for some special reason it was either invalid, or did not apply to this case. No such reason being shown, it ought to have been admitted.

The main question in this case arises on the action of the court in granting the nonsuit. Assuming the evidence to be true,—which we must for the purpose of a nonsuit,—the question is, did it present such a case as justified the court in determining as a matter of law that the appellant could not recover? To determine this, it becomes important to advert to the relative rights of the public and street-railway companies to the use of the streets in a city. When streets in a city or village have been regularly platted and dedicated for public use, all persons have equal rights thereon, so far as

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public travel is concerned. Originally, such streets were not designed for street railways, but they were confined to the right of public travel in the ordinary modes. Courts, however, have become much more lax in the enforcement of strict technical rules as to the use of streets, through advanced civilization, enlightened public policy, and a desire to subserve the public welfare, and now permit a reasonable portion of the streets to be used for street railways, holding that such is a proper use. Nevertheless, this confers upon a street-railway company no superior right to that of the public at large, except the right to lay its track and operate its cars, which must be done with as little inconvenience to ordinary travel as practicable. Nor does its franchise, apart from this, confer upon it any greater or superior right to the use of the street than is enjoyed by any one of the citizens. The right to lay its track and operate its cars includes within it no exclusive right to the use of any particular portion of the street, not even that whereon the track is laid. Nor does it relieve the company from its obligations to exercise due care in the operation of its road, so as to avoid injury to persons traveling upon the street, or in the rightful use of the same, or from liability for accidents, which are the proximate result of the want of proper care, skill, or vigilance on the part of its agents. The duty of the company to recognize the rights of persons in the lawful use of the streets is imperative, and if it adopts a propelling power which increases the hazards of such persons it must be held to a degree of care proportionate to the increase of danger because of such propelling power. This is so because, the more dangerous the appliance, the more likely it is for casualties to happen, and, consequently, the greater the degree of care which must necessarily be exercised in order to avoid their occurrence. As the company, however, is held to a degree of care commensurate with the circumstances of each particular case, so, likewise, is the citizen, for he cannot recklessly place himself in the way of danger, and then complain of injury. He is bound equally with the company to the exercise of a proper degree of care, skill, and vigilance. He has no exclusive right to any particular portion of the street, any more than has the railway company. Ordinarily, he may walk or drive upon the track or cross it, but because cars are designed to run only upon the track he cannot heed-

Rights of
street railway
in public
street.

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lessly obstruct its passage without assuming the risk of injuries for which he may have no redress. The car has the right of way in case of meeting a person or vehicle on the track, but each party, in order to avoid accident, is bound to exercise ordinary care, and such reasonable prudence and precaution, as the surrounding circumstances may require. These circumstances necessarily vary in each particular case in their relation to each other, and the conduct of the parties must be considered in the light of their surroundings at the particular time when they were called upon to act. What may be considered ordinary care in one case may, under the circumstances of another, amount to culpable negligence. So an act which would have been viewed with indifference when the street cars were drawn by horses at such low rate of speed as to be easily controlled, might be gross negligence when the car is propelled by electric power at a much higher rate of speed. Mr. Justice LAMAR, delivering the opinion of the court in *Railway Co. v. Ives*, 144 U. S. 408, 55 Am. & Eng. R. Cas. 159, said: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence." *Shea v. Railroad Co.*, 44 Cal. 414; *Nickols v. Jones*, 166 Pa. St. 599; *Dooly Block v. Salt Lake Rapid Transit Co.*, 9 Utah 31; *Railway Co. v. McKewen*, 80 Md. 593; *Railway Co. v. Whitcomb*, 66 Fed. Rep. 915. From a consideration of these principles it is evident that the existence of negligence in each case must depend upon the circumstances peculiar to it, and which surrounded the parties at the time of the occurrence, on which the controversy is based. Where negligence does appear, there are generally some prominent facts which show a want of due regard for the safety of others, or an absence of proper care and precaution, so as to avoid the casualty, or incaution or lack of skill in the use of dangerous instrumentalities in places obviously perilous, or the doing of an act which duty had forbidden, or the omission to do one which

Rule where
street car
meets person
or vehicle.

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duty had commanded to be done. If, in any case, these facts, or any one of them, appear, and in addition thereto it is shown that, in consequence thereof, injury has been inflicted upon a person who was himself in the exercise of ordinary care and reasonable prudence, and not so connected with the author of the injury as to have assumed the hazard, then it is a case of negligence, for which an action will lie.

Applying this test to the case at bar, it follows conclusively, from the facts above stated, as shown by the plaintiff's testimony, that the railway company was guilty of negligence on the occasion of the accident. The car was propelled by an electric motor, at the rate of 25 to 30 miles an hour, on a public highway in the city of Ogden; but, notwithstanding such high rate of speed, and the fact that the car was approaching a public crossing, no gong was sounded until about the time of the collision; nor were the brakes applied, nor any attempt made to stop the car, nor any proper warning given. Under these conditions and circumstances, how can it be successfully contended that the railroad company was not derelict in its duty? It is apparent from the evidence that, if the car had been run at a reasonable rate of speed, the accident could have been averted; but, even at the speed the car was running, the motorman, by exercise of ordinary care, could have averted it. The track was straight for a long distance north of the crossing in question, and there was nothing to obstruct his view thereon. If he saw the plaintiff in his perilous position in time to stop the car and avoid the injury, he was bound to do so. If he did not see him, then he was equally guilty of negligence, because it was his duty to look, and ascertain whether or not the track was clear, when he was approaching a public crossing. So when

**Duty of motor-
man.** he was approaching such crossing it was his duty to sound the gong as warning. If, as is contended

by counsel for the respondent, the plaintiff was driving alongside the track, with his back towards the car, it was especially the duty of the motorman to give warning, and keep his car under control. He had no right to presume that the plaintiff would not cross the track at such crossing. The contention of counsel for the respondent that it was the duty of the plaintiff to look out to see that the way was clear before crossing the track applies with equal force to the motorman operating the car. Such duty, in law, was imposed

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on both parties. The plaintiff, having looked for a car after he left the sidewalk, and having seen none, may have been lulled into a sense of security that there was no danger, and he may not have been as vigilant as he ought to have been, but that did not relieve the defendant from performing his duty when approaching the crossing. "It is the duty of a street-railway company to exercise ordinary care and diligence to prevent injury to persons lawfully traveling the street or road occupied by its tracks. It is bound to know that the public may use the entire road or street when not in actual use by its cars, and it must employ reasonable means to prevent injury to those who it knows may rightfully so use the road or street; for this knowledge requires that it shall exercise care and diligence to make it reasonably safe to travel the highway in the ordinary mode." Elliott, Roads & S., p. 585; Busw. Pers. Inj., § 123; Swain v. Railroad Co., 93 Cal. 179; Piper v. Railroad Co., 77 Wis. 247; Traction Co. v. Appel, 80 Md. 603; Railway Co. v. Woodlock (Tex. Civ. App.), 29 S. W. Rep. 817; Robinson v. Railroad Co., 48 Cal. 409. The city ordinance which the plaintiff attempted to introduce in evidence limited the rate of speed on railroads in Ogden City to eight miles an hour, but, whether or not the ordinance applied to this case, and regardless of any ordinance limiting the rate of speed, a railroad company has no right to run its cars at such a high rate of speed, over a public crossing, or through a frequented street in a city, as will endanger public safety, and put those who are rightfully in the use of the street to extra hazards. Railway Co. v. Ives, *supra*; Thompson v. Railway Co., 110 N. Y. 636; Railroad Co. v. Perkins, 125 Ill. 127; L. & N. R. Co. v. Com., 13 Bush. 388. Some courts hold that where the speed is greater than that permitted by the ordinance, it is negligence *per se*; but the better rule, and the one sustained by the weight of authority, appears to be that it is a circumstance from which negligence may be inferred, and is always proper to be considered, by the jury, in determining the question whether or not the railway company was guilty of negligence. Busw. Pers. Inj., § 122; Riley v. Rapid Transit Co., 10 Utah 428; Railway Co. v. Ives, *supra*; Railway Co. v. Breitling (Tex. Sup.), 12 S. W. 1121; Tramway Co. v. Reid (Colo. App.), 35 Pac. Rep. 269. The conclusion is irresistible that on the

Ordinance in
respect to
speed of street
car.

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question of negligence of the defendant there was ample evidence to be presented to the jury, but counsel for the respondent insist that the appellant was guilty of such contributory negligence as precludes his recovery. It is urged in support of this contention that, had the appellant looked to the north before going upon the track, he would have observed the car, and then could have stopped his horses until it had passed, and thus avoided the injury; and that, having failed in this, he was the author of his own misfortune. It is not clear from the evidence that if he had looked north immediately before going upon the track, he would have observed the car. In fact it is shown that from his position, just before his horses stepped upon the track, the electric poles formed some obstruction to the view, and it cannot be presumed that he was reckless as to his own safety. It would be more reasonable to infer from the evidence in the record that he felt secure because of the observation he had made, when in a position where his view was unobstructed. He was lawfully upon the street, and had a right to cross the track, and, attempting to do so at a public crossing, after he had looked and seen no car, had a right to assume that the railway company would give proper warning of the approach of a car, and not run him down recklessly. Persons traveling on a public street, along or across a street railway track, are not held to the exercise of the same degree of care and precaution as they are when traveling along or upon or across an ordinary steam railroad; and this is so because the people have the right to travel on every portion of the highway, while they have usually no such right on a steam railroad track, and because street cars can be brought under control much more readily than can the cumbersome railroad trains. Elliott, Roads & S., pp. 589, 590; Beach, Contrib. Neg., § 89. Even if the appellant drove upon the track incautiously, still the company was bound to the exercise of ordinary care and vigilance to avoid the accident. It could not recklessly and without proper care run its car, and then, when injury resulted to a person, because of its recklessness, escape liability, on the ground that such person was negligent in the first instance. The rule of law is no longer open to doubt that where the injured party was negligent, in the first instance, such negligence will not defeat his action if it be

Care required
of persons
traveling in
public street.

Rule where
both parties
are negligent.

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shown that the defendant might have avoided the injury by the exercise of ordinary care and reasonable prudence. Both parties have mutual obligations to exercise due care and vigilance to avoid the consequences of their negligence, and the question as to whether negligence was the proximate and direct cause of the accident is one of fact for the jury to determine under the circumstances of each particular case. Shear. & R. Neg., § 99; Everett v. Railway Co., 9 Utah 340, 34 Pac. 289; Leak v. Railway Co., 9 Utah 246; Railway Co. v. Ives, *supra*; Coasting Co. v. Tolson, 139 U. S. 551; McClain v. Railroad Co., 116 N. Y. 459, 40 Am. & Eng. R. Cas. 254; Davies v. Mann, 10 M. & W. 545; Little v. Railroad Co., 88 Wis. 402; Wines v. Railway Co., 9 Utah 228; Jeffs v. Railway Co., 9 Utah 374; Railway Co. v. McKewen, 80 Md. 593; Beach, Contrib. Neg., § 5.

It is evident that the record in this case does not present such a state of facts that all reasonable men must arrive at the same conclusion from a consideration of them, and yet such must be the facts proven before the question of negligence becomes one of law for the court. Nor are there such prominent and decisive facts proven concerning the appellant's conduct on the occasion of the accident as to warrant the court in pronouncing it such contributory negligence that in law he is not entitled to recover. Where the propriety and reasonableness of the acts and conduct of the parties at the time of the accident can be properly or correctly determined only by a consideration of all the circumstances connected with and surrounding the occurrence, it is within the province of the jury to determine whether there was negligence, and, if there was, whose negligence was the proximate cause of the injury. The subject of nonsuit was considered in the case of Lowe v. Salt Lake City (decided at the present term), 44 Pac. Rep. 1050. Our views expressed on this subject in that case apply with equal force to this. See, also, Dederichs v. Railway Co. (decided at the present term), 44 Pac. Rep. 649.

Questions of
law and fact.

The other case referred to in the record, which was brought for damages to personal property, and tried before a justice of the peace, was afterwards consolidated with this, and the two were then tried together in the district court, and heard together on appeal, both controversies resulting from the same accident, and affecting the same parties. Therefore

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our intention is that this opinion shall apply to both cases. It is manifest that the trial court erred in making the orders in question. This cause must therefore be reversed, with costs, and remanded, with directions to the court below to set aside the erroneous orders, and grant a new trial. It is so ordered.

ZANE, C.J., and MINER, J., concur.

FISHER

v.

WEST VIRGINIA & P. R. Co.

(Supreme Court of Appeals of West Virginia, April 11, 1896.)

Riding on Platform of Car.—It is the duty of a passenger unnecessarily riding on the platform of a car in motion to go into the car when requested by the conductor or other person having charge of the train when there is standing room inside; and if, by reason of his refusal to do so, and by going onto the steps of the car without the knowledge of the conductor or other person having charge of the train, he loses his balance, by reason of a lurch of the car in rounding a curve, and falls overboard, and is injured, he is guilty of contributory negligence, such as will preclude his recovery for such injury.

Jury may not Disregard Instructions.—Where instructions are given by the court which properly propound the law applicable to the facts proven, the jury cannot disregard such instructions; and if they do so, their verdict will be set aside.

Contributory Negligence is a Bar to a Recovery.—The carrier is exonerated when the proximate and moving cause of the injury was the act of the injured passenger himself; since the rule is general that no one can charge another in damages for negligently injuring him where he himself failed to exercise due and reasonable care in the premises.

Same.—A passenger who voluntarily and unnecessarily places himself in a position of danger cannot hold the railway responsible for injuries of which his position is the efficient cause; as, for instance, his riding on the platform of a moving car, contrary to the request of the conductor.

Intoxication as Affecting Negligence.—The self-inflicted disability of intoxication will not excuse the wayfarer from the exercise of such care as is due from a sober man.

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ERROR to circuit court, Lewis county.

Case by John H. Fisher against the West Virginia & Pittsburgh Railroad Company. There was a judgment for plaintiff, and defendant brings error. *Reversed.*

John Brannon, W. W. Brannon, and W. Mollohan, for plaintiff in error.

John J. Davis, C. C. Higginbotham, and G. E. Price, for defendant in error.

ENGLISH, J.—This case was before the court in the year 1894. It was submitted on the 22d day of January, and decided on the 11th day of April, in that year; being then reversed, the verdict set aside, and a new trial awarded the defendant. *Fisher v. West Virginia & P. R. Co.*, 39 W. Va. 366. The action was brought on the 29th day of August, 1891, in the circuit court of Lewis county, by John H. Fisher, suing by his next friend, John S. Fisher, to recover damages from the West Virginia & Pittsburgh Railroad Company for personal injuries alleged to have been received by the plaintiff by reason of his being allowed by the conductor of the train, while being carried as a passenger on the train, to ride on the platform of the car in an intoxicated condition, and, in consequence of the negligent conduct of the conductor in allowing him to remain on said platform, he was thrown from the platform or steps of the car, and had his feet crushed by the wheels of the car. The case was again tried before R. G. LINN, special judge; and on the 13th day of March, 1895, the case was again submitted to a jury, and, after the evidence of the plaintiff had been fully introduced and heard in chief, the defendant moved to exclude the plaintiff's evidence from the jury, which motion was overruled. The defendant then introduced its evidence, and a verdict was rendered for the plaintiff for \$5,000. The defendant thereupon moved to set aside said verdict, because the same was without and contrary to the evidence, was against and contrary to the instructions of the court to the jury, was excessive, and for other errors of law, and to grant it a new trial, which motion was overruled, and the defendant excepted, and took a bill of exceptions, setting forth the evidence heard by the jury. The court rendered judgment upon the verdict, and the defendant applied for and obtained this writ of error.

The salient facts upon which this suit was predicated

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appear to have been that the plaintiff, a young man, a little over 20 years of age, who resided with his father in the town of Buckhannon, had gone to the town of Weston on the 18th of October, 1890, and, while there, had indulged in drinking too freely. On the afternoon of the 20th of the same month, he started with his father to return to the town of Buckhannon, on a train belonging to the defendant, boarding it at Weston. The train was a mixed train, having but one passenger car. The plaintiff's father took a seat in the car, but the plaintiff remained on the front platform of the car, and refused to go in when requested by the conductor. The plaintiff had been drinking before boarding the train, and had a bottle of whiskey with him, from which he took a drink or two after leaving Weston. While the train was running at a moderate speed, plaintiff went on to the steps leading from the platform, holding to the iron railing on each side. For some purpose, he let go of the railing with his left hand, and just then the train gave a lurch, and he was thrown from the train, but for a time held to the railing with his right hand; but finally, releasing his hold, he fell to the ground, the hind wheels of the coach passed over his feet, and crushed them to such an extent that amputation was necessary.

The first error relied on by the plaintiff in error is claimed to consist in the action of the court in refusing to strike out the plaintiff's evidence, the same failing wholly to sustain the plaintiff's action. The plaintiff in error, however, after making its motion to strike out the plaintiff's evidence, proceeded to introduce its own testimony, and this court held in the case of *Core v. Railroad Co.*, 38 W. Va. 456, that "if the defendant, after the court has overruled its motion to exclude the plaintiff's evidence on the ground of insufficiency, proceeds with its defense, and introduces its evidence, this court will disregard such motion, and will not reverse the judgment, unless it appears that the whole evidence is insufficient to justify the verdict of the jury." And the same, in substance, has been held in other cases by this court, and for this reason we must disregard this assignment as not well taken.

The next assignment of error relied on is to the action of the court in refusing to set aside the verdict as being without evidence to support it, and this may be considered in connection with the third assignment of error, claiming that it consisted in refusing to set aside the verdict as contrary to the

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evidence, the said verdict being manifestly contrary to the evidence. It appears by the testimony that in the door of the passenger car there was a metal plate, on which was printed, in plain letters, "Passengers not allowed to ride on the platform." The plaintiff came on the train with his father, who went inside, and took a seat, while the plaintiff remained on the platform, although it appears that there were several vacant seats on the inside of the car. When the conductor took up the plaintiff's ticket, he says: "I then asked him very kindly to come inside, and get a seat. He said he would be in directly. After I got through taking up the tickets, young Mr. Fisher still rode out there. I went to him again about three miles from Weston; asked him to come in and get a seat." He refused to come in. At the instance of the plaintiff's father, the conductor went to him again, and requested him to come in. The plaintiff then got very angry, and said "he had paid his fare, and he would ride where he damned pleased." After the accident, the conductor states that he backed the car, and went to the plaintiff, and found him raised up on one elbow, lying down, looking at his feet, and asked him how in the world did he come to fall off. He said he leaned out, and looked around the curve, and lost his balance, and fell off, and that the hind wheels of the coach passed over his feet. And, while it is true that the plaintiff contradicted this statement of the conductor as to what he said when he was asked how it happened, yet it must be remembered that the plaintiff, lying on the ground with his feet mashed off, and under the influence of liquor, was not in a good condition to remember accurately what was said; but when the plaintiff, in his testimony, undertakes to relate how the accident happened to him, he does not differ very materially from what the conductor says he told him when he first reached him after the accident. He says: "I was standing on the platform, maybe one step down on the steps. I had one hand holding on to the iron rail in front of the coach, and the other hold of the iron next to the coach. I let loose with my left hand, and still held on with my right hand; and the train made a sudden lurch, and threw me off." And the conductor says he never saw him on the step at all; that he was sitting down on top of the platform, with one foot down on one step of the platform, when he saw him. So, according to the plaintiff's own statement, he must have arisen

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from that position, as he was standing on the step holding to the railing with his right hand when the accident occurred.

Now, as to the conversation detailed by Mrs. Brannon as having occurred between her and the conductor when she was on the train, as she says, two or three days, perhaps the next day, after; can the admissions made to her by the conductor on that occasion bind the defendant? She states that the conductor said it was his duty to have compelled him to go in, or stop the train, and put him off. He said "it was against the rules for any one to ride there, and said he never hated anything so much in his life; that he knew he had not done his duty." As to declarations and admissions made by an agent, 1 Greenl. Ev., § 113, says: "A kindred principle governs in regard to the declarations of agents. The principal constitutes the agent his representative in the transaction of certain business. Whatever, therefore, the agent does in the lawful prosecution of that business is the act of the principal whom he represents; and, where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestæ* * * * The party's own admissions, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all." See Railroad Co. v. Gallahue's Adm'rs, 12 Grat. 655 (eighth point of syllabus). The same witness says that "plaintiff came to Weston on Saturday, and I knew he was drinking. He was a young boy, away from home; my sister's child. Saturday night he went to Willie Hall's, and had lost his hat. I went over, and asked Willie (I knew he was not capable of taking care of himself) if he would take him home. He said he would do it. Willie had some position on the train, the Buckhannon train. Willie did not do it, and the next morning his father came over." This testimony shows that plaintiff had been on a spree at Weston, and also shows the effect that liquor had on him, and accounts for the solicitude of his father concerning him while on the platform of the car; and, notwithstanding the plaintiff's recent experience, he came on to the train provided with a bottle of whiskey. Returning

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again to the immediate circumstances attending the accident, the conductor says, when he last saw him, he was sitting down on the platform with his feet on the first step. Now, what was his object in rising and taking his position on the steps with one hand on each railing? The most plausible reason for this act which suggests itself to my mind is that he did it for the purpose of getting beyond the range of the car door, and escaping the view of his father and the other passengers, and that he let go of the railing with his left hand for the purpose of reaching his flask in his pocket, with the intention of taking another drink unobserved, when, the car making a short turn around the curve, he was thrown to the ground by the centrifugal force.

Proceeding to apply the law to these facts in this case, let us inquire first whether the intoxicated condition of this unfortunate young man should excuse his negligent conduct, and entitle him to a recovery in this case. **Intoxication as affecting negligence.** In the case of *Smith v. Railroad Co.*, decided by the supreme court of North Carolina May 9, 1894, and reported in 19 S. E. 863, SHEPHERD, C. J., delivering the opinion of the court, says: "We are also of opinion that there was error in ignoring that universally established principle in the law of contributory negligence which imposes upon one who has voluntarily disabled himself by reason of intoxication the same degree of care and prudence which is required of a sober person. This is so well established that it would seem unnecessary to cite authority in its support." Patterson, in his work on Railway Accident Law (page 74, § 76), says: "The fact that the person injured was intoxicated at the time of the injury will not relieve him from the legal consequences of his contributory negligence;" citing numerous authorities. 1 Thomp. Neg., p. 430, § 4, after speaking of deafness, says: "Nor will the self-inflicted disability of drunkenness excuse the wayfarer from the exercise of such care as is due from a sober man;" citing *Railroad Co. v. Bell*, 70 Ill. 102; *Railway Co. v. Riley*, 47 Ill. 514. 1 Shear. & R. Neg., § 93, thus states the law on this question: "The fact that the plaintiff was intoxicated at the time of the injury, while competent and material evidence to lay the foundation of a charge of contributory negligence, is not of itself sufficient to charge him with such negligence as will defeat his action, unless it is proved or reasonably to be inferred from the circumstances

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that it prevented him from taking ordinary care to avoid the injury." *Pierce, R. R.*, p. 295, says: "The intoxication of the person may contribute to the injury by leading him to place himself in an exposed position, or preventing the full use of his faculties, and may be put in evidence to prove negligence on his part; but, unless it contributes to the injury, it will not affect his right of action." In the case of *Strand v. Railway Co.*, 67 Mich. 380, it was held: "A man cannot volutarily place himself in a condition whereby he loses such control of his brain or muscles as a man of ordinary prudence and caution in the full possession of his faculties would exercise, and thereby contribute to an injury to himself, and then require of one ignorant of his condition recompense therefor."

But if we were warranted in saying, in view of the testimony in this case, that the plaintiff was not under the influence of liquor, was his conduct after taking passage on this train consistent with the dictates of care and common prudence, or should it be characterized as negligent? He refused, in response to repeated requests of the conductor, and with the notice on the door before him, to go into the passenger car. Although, it is shown, there was plenty of room, yet he persisted in remaining on the platform. And what does the law say of such conduct on the part of a passenger? In the case of *Graville v. Railroad Co.*, 105 N. Y. 525, 34 Am. & Eng. R. Cas. 375, it was held that "it is the duty of a passenger standing on the platform of a steam railroad car to go inside the car when requested so to do by a trainman, if there is standing room inside, although there are no vacant seats." *Pat. Ry. Acc. Law*, § 272, states the law on this question thus: "It is well settled that a passenger who voluntarily and unnecessarily places himself in a position of danger cannot hold the railway responsible for injuries of which his position is the efficient cause; as, for instance, where his injuries result from his crossing the line in front of a moving train, whose approach is known to him, * * * or from his riding on the platform of a moving car before the train comes to a stop,"—citing *Secor v. Railroad Co.*, 10 Fed. Rep. 15. But, as before stated, it has been held that the failure of the railway to perform its duty of providing the passenger with a seat will excuse his contributory negligence in riding on the platform. Yet this doctrine cannot be regarded as reasonable, for, if the passenger cannot obtain a

Riding on
platform of
car.

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seat, he may stand within the car, or he may refuse to proceed on the journey, and may hold the railway responsible for damages resulting from its breach of contract; but injuries resulting primarily from his voluntarily putting himself in a position of such obvious danger as that of riding on the platform of a car in motion cannot be said to have been proximately caused by the failure of the railway to provide him with a seat. Beach, Contrib. Neg., § 149, says: "It is not negligence *per se* for a passenger to ride upon the platform of a railway car, nor is it negligence to stand upon the platform of cars in motion when there are no vacant seats inside the car; but, as a general rule, voluntarily and unnecessarily to stand or ride upon the platform is such negligence as will prevent a recovery for injuries received while there. If there is even standing room within the car, it is negligent to occupy the platform." Schouler, in his work on Bailments and Carriers, after speaking of the duty owed by carriers to passengers under their charge, says: "Where the injury in question was proximately occasioned by the act of God or the public enemy, or even by accident and misfortune in the lesser sense above implied, and without his own fault, the carrier is certainly absolved from liability. And reason and common justice demonstrate, too, that the carrier is exonerated when the proximate and moving cause of the injury was the act of the injured passenger himself; since the rule is general that no one can charge another in damages for negligently injuring him, where he himself failed to exercise due and reasonable care in the premises." The rule in Virginia is stated in Bailey's work on Master's Liability for Injuries to Servant (page 399), as follows: "That one who is injured by the mere negligence of another cannot recover any compensation for his injury if he, by his own ordinary negligence or willful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and cooperating fault, the injury would not have happened to him, except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence,"—citing *Dun v. Railway Co.*, 78 Va. 645, 16 Am. & Eng. R. Cas. 363; *Rudd v. Railway Co.*, 80 Va. 549; *Railroad Co. v. Yeamans*, 86 Va. 860. In West Virginia the rule is laid down

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in the case of *Gerity's Adm'x v. Haley*, 29 W. Va. 38, as follows: "Where negligence is the ground of the action, it rests upon the plaintiff to trace the fault of his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if, from these circumstances, so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and, on plaintiff's evidence alone, the jury should find for the defendant." This ruling was followed in the case of *Butcher v. Railroad Co.*, 37 W. Va. 180, and several other cases, and, as we think, correctly states the law. It appears from the testimony that, at the time the plaintiff received the injury complained of, the defendant had no rule requiring the conductor to stop the train and put a passenger off, if he persisted in riding on the platform, and refused to obey the conductor's request to come inside of the car; and, if the conductor had taken that course, a suit would most probably have been the consequence of ejecting him from the train. It must be presumed that the conductor wished to treat the plaintiff in a considerate and gentlemanly manner, in the presence of his father and the other passengers; and, acting on his best judgment, he did not consider it his duty to attempt to force him into the car, and create an excitement among the passengers, when he says he did not think he was sufficiently drunk to be unable to care for himself; and then the conductor says he did not see plaintiff after he took the dangerous position, standing on the steps, being ignorant of the fact that he had thus exposed himself to danger, he could not be blamed for not interfering and forcing him to enter the car.

The instructions asked for by the defendant were given to the jury, and read as follows, the court, however, modifying the last instruction, D, and refusing to give instruction 6, which action appears to have been excepted to: Instruction No. 1: "The jury are now instructed that the plaintiff, as passenger on the defendant's car, as a matter of law, is presumed to have taken upon himself all the risk necessarily incident to that mode of traveling; and if the jury believe from the evidence that, without the fault of the defendant, but by inevitable accident, plaintiff was injured, the jury should find for the defendant." Instruction No. 2: "The court instructs

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the jury, as a matter of law, that a passenger upon a railroad train takes all the risk attending that mode of travel, except such as may be caused or incurred by the negligence of the railroad company or its servants; and, unless such negligence by the defendant is shown by the evidence, the jury should find for the defendant." Instruction No. 3: "The court instructs the jury that, as a matter of law, a regulation of a railroad company which forbids passengers to stand upon the platform while the car is in motion is a reasonable and proper rule; and if a passenger, in violation of such a regulation, unnecessarily exposes himself, he does so at his own peril." Instruction No. 4: "If the jury believe from the evidence that both the plaintiff and defendant were guilty of negligence, that such negligence of both was concurrent or running together, and cooperated to produce the injury complained of, they should find for the defendant." Instruction No. 5: "If the jury believe from the evidence that the injury in the declaration mentioned was the result of the concurrent negligence of both the plaintiff and defendant, the jury has no right to apportion the fault, and to find a verdict for the plaintiff upon that ground, but in such case they should find for the defendant." Instruction No. 6: "The court instructs the jury that railroad companies are only required to exercise due care that a passenger is not injured through their fault, and they are not required to exercise such supervision over him as absolutely prevents him from being injured by his own fault." Instruction No. 7: "The court instructs the jury that a railroad company has no right or authority under the law to impose upon its passengers any restraint even to enforce its reasonable rules." Instruction No. 8: "The court instructs the jury that, in determining the question of whether the plaintiff was guilty of contributory negligence, they may take into consideration the condition of the plaintiff at the time,—that is, if he were intoxicated at the time of the injury, or partly so,—they may take this fact into account in determining whether he was guilty of contributory negligence." Instruction No. 10: "The plaintiff to recover must have observed ordinary care to avoid the injury, and, if he does not do so, he cannot recover." Instruction B: "The court further instructs the jury that, in enforcing any reasonable regulation or direction, a railroad company is not allowed to treat its passengers as children, or to put them under restraint." Instruction C:

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“ The court instructs the jury that if they believe from the evidence that the plaintiff was riding on the platform of the defendant’s car in such a state of intoxication as to be careless and heedless of the danger to which he was exposed, and the conductor was aware of his position and exposure to danger, it was the duty of said conductor to use only ordinary precautions for his safety, such as calling his attention to the danger and the rules of the company forbidding such exposure, but such conductor would not be required to exercise or impose any restraint upon the plaintiff.” And the defendant moved the court to give to the jury instruction marked “ A,” to which the plaintiff objected, and the court sustained said objection, and refused to give said instruction, to which ruling the said defendant excepted, which said instruction “ A ” is in the words and figures following: Instruction A: “ The court instructs the jury that if a passenger voluntarily puts himself in a dangerous position, and, by reason thereof, is injured, he cannot recover from the defendant.” And the defendant moved the court to further instruct the jury by giving to the said jury instruction marked “ D,” in the words and figures following: Instruction D: “ The court instructs the jury that it is the duty of a passenger unnecessarily riding on the platform of a car in motion to go into the car when requested by the conductor or others in charge of the train, if there be only standing room in the car; and if the jury believes from the evidence that his failure to obey such request contributed to the plaintiff’s injury, they should find for the defendant,”—to the giving of which the plaintiff objected, and thereupon the court modified the said instruction D by striking from the end thereof the following words: “ And if the jury believe from the evidence that his failure to obey such request contributed to the plaintiff’s injury, they should find for the defendant.” And the court gave the jury the remainder of the said instruction, to which ruling and opinion of the court the defendant excepted.

We regard these instructions as propounding the law correctly, and if the jury, in considering their verdict, did not utterly fail to apply the law therein stated to the facts proven, we cannot see how they arrived at the conclusion they did. And we think the fourth assignment of error, that “ the court erred by refusing to set aside the verdict as contrary to the instructions

Jury may not
disregard
instructions.

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of the court, the same being in direct conflict with the said instructions," was well taken, and the verdict of the jury should have been set aside, and a new trial awarded for that reason. Looking through the entire evidence in the case, our conclusion is that the proximate cause of the defendant's injury was his own obstinate and perverse conduct in refusing to obey the reasonable requests of the conductor in voluntarily subjecting himself to the influence of liquor, and in needlessly and negligently assuming the dangerous position on the steps of the car from which he fell; and I fail to see what duty owed to the plaintiff by the defendant was violated by the conductor.

For these reasons, the judgment complained of must be reversed, the verdict set aside, and a new trial awarded the defendant, with costs to the plaintiff in error.

HOLT, P. (dissenting).—This case has been before two juries, and each one found that the defendant did not, in carrying an intoxicated passenger, use such care to carry him safely and securely as the law of their contract and the exigencies of the occasion demanded. Three facts of some bearing in certain aspects of the case were brought out on this trial which did not appear on the first trial at all, or with the same distinctness and certainty: (1) On the first trial, the plaintiff did not say that he was not notified by the conductor to get off the platform. On this trial he denies that the conductor made any such request; and, as to the making any such request at the instance of plaintiff's father, his denial is supported by the testimony of another witness. (2) On the first trial, the conductor, in his evidence, stated that it was a rule of his company, "if the passenger refused to leave the platform, the conductor should stop the train, and put him off, or make him go inside." On this trial the defendant company proved by the same conductor that they had no such rule at that time, and had none such until the January following, that his statement on the first trial was an error. (3) On the first trial, the conductor testified that he had asked the plaintiff twice before that time (that time made the third time) to go in, and also one of the brakemen had tried to get him in. This time the conductor testified that Graves, one of the brakemen, insisted on the plaintiff's going in; that they had several words about it, and came near getting into a racket.

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“ In fact, I had to go to Graves, and tell him not to go too fast with him.” (4) The tenor of the rest of the testimony is very much the same, except that the fact is now brought out more distinctly that plaintiff’s reason was submerged with whiskey; that, before he fell off, his ordinary rational faculties were so far gone that he was unconscious of his incapacity to take care of himself. He did not appreciate the danger of riding on the platform; was rash enough to sit down on the platform with one foot on the step; and was utterly heedless of the probable consequences of such conduct. This part of plaintiff’s case, constituting the state of negligence, the remote cause of the injury, the condition in which the conductor’s failure and refusal to bring him in off the platform intervened as the sole proximate cause of the injury, is now, in my opinion, put beyond the reach of any serious questioning. This young man, 20 years of age, obviously intoxicated to some degree of drunkenness, was accepted by the railroad company as a passenger, under the common-law obligation to carry him safely and securely. When he and his father entered the train, the son stopped on the platform. The father was a witness on the first trial. He died before this one, but his testimony on the first trial was read to the jury on the second. He says that, becoming uneasy, he went out, and told his son he had better come into the car. The plaintiff told him he would come in in a few minutes. As he did not come in, the father told the conductor to go out, and bring him into the car. The conductor went out, and came back without him. “And he came to me, and told me that he was in no danger; as long as they didn’t stagger, they were all right.” The conductor’s evidence on this point is: “John S. Fisher wanted me to go out and speak to his son. He said that he thought he was drinking a little, and he was afraid he would get hurt. I didn’t go right away, but after a little I did. It was between there and Seymore Station. That made three times that I had asked him to come in. That time he got very angry, and, using his own words, said: ‘He had paid his fare, and he would ride where he damned pleased.’ I went back, and told him his son was sitting on the platform. He had been standing down on the car step. To relieve his father, I said I didn’t believe his son was drinking enough to fall off.” At another place, he says it was a dangerous place for a sober man to ride, and still

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more so for a drunken one. He thus quieted the apprehensions of the father for a moment, for in less than 10 minutes the young man was thrown off. Mrs. Judge Brannon, the aunt of the plaintiff, two or three days after the accident, was on the train going over to Buckhannon. On this point her testimony, certainly competent in fact, and for the purpose of discrediting the conductor, and nowhere objected to, is as follows: "The conductor came to me, and asked me to come to the rear of the train, and look where the accident happened. When we returned to our seats, he sat down by me, and commenced to relate the whole affair. He said that Johnnie was standing on the platform, and was intoxicated. He said John S. Fisher had requested him to go and bring him into the car. He said he did not tell him to come in, from the fact that it would raise an excitement. He said he told Mr. Fisher his son was not drunk enough to be in any danger; and about ten minutes after that he fell off, and he never hated anything so much in his life." Some comment is made in the opinion of the majority of the court on a part of the testimony of Mrs. Judge Brannon which is incompetent, because it gives the admissions of the conductor made at a time when it was not a part of the *res gestæ*. See 1 Am. & Eng. Enc. Law (2d Ed.), p. 1143. This, however, does not apply to the whole of her testimony. None of it was objected to when the question was asked and the answer given. There was no motion to strike out, or for instruction to disregard it. It was not made one of the grounds for the motion for new trial. It is not assigned as one of the grounds of error, either in the petition or in the briefs or arguments of counsel. I do not think it the duty of the appellate court in such case to sift out the incompetent phrases *sua sponte*, where both parties wish it to remain in, because, perhaps, dispensing with the inconvenience of calling a witness who heard him say the same thing *dum fervet opus*. Besides, it has a bearing on the credibility of the witness, who is contradicted by the plaintiff on the question of the conductor's having requested him to come in. It has been held that a party demurring to the evidence waives all objections to the competency of the evidence. Elliott, App. Proc., §§ 689, 781. The particular manner in which an admitted truth has been introduced into the cause as evidence does not seem to be of any importance. Chapise v. Bane, 1 Bibb 612. But this, in my view, has no great

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bearing. I take the case for this occasion as the conductor himself and John H. Fisher, the father, have made it. This case is only an instance under the general rule that the contributory negligence of the injured party, in order to constitute a defense, must have contributed as the proximate cause of the injury. If it were the remote cause, or a mere condition of injury, it is no bar to the plaintiff's action. It is not a proximate cause when the negligence of the defendant is an efficient intervening cause. 2 Wood, R. R. (Minor's Ed.), p. 1448, § 319a. Contributory negligence of plaintiff is no bar to his action when it appears that defendant might, by the exercise of ordinary care, have prevented the injury in spite of such negligence. See *Coasting Co. v. Tolson*, 139 U. S. 551; *Carrico v. Railroad Co.*, 35 W. Va. 389; *Washington v. Railroad Co.*, 17 W. Va. 190. It is the absence of such as is required by the circumstances. *Blaine v. Railway Co.*, 9 W. Va. 252. "Therefore, where the negligence of the injured party is seen by the employes of the railway company in time to prevent injury from such negligence, their failure to exercise care to prevent the injury will render their employer liable." 2 Wood, R. R., p. 1449, note 1; Cooley, Torts (2d Ed.) p. 810; Pollock, Torts, 374 *et seq.*; 1 Beven, Neg. 176. Here the railroad company, by exercising ordinary care, had the last opportunity of preventing the accident. Bish. Noncontr. Law, § 463; Thomp. Carr. Pass. 243; Beach, Contrib. Neg., § 33; 2 Redf. R. R. 255, 256; Patt. Ry. Acc. Law, §§ 44, 55 *et seq.*; *Railroad Co. v. Cooper*, 120 Ind. 469; *Toomey v. Railroad Co.*, (Cal.) 24 Pac. 1074; *Freer v. Cameron*, 4 Rich. (S. Car.) 228; *Johnson v. Railroad Co.*, 20 N. Y. 65; 1 Shear. & R. Neg., § 99; Busw. Pers. Injury, p. 200, § 134; Smith, Neg. (by Whitaker) 374; Whart. Neg., §§ 306, 323, 340, 389a; Bigelow, Torts, 538. To prevent injury to a passenger, the common carrier is bound to the highest degree of skill, care, and diligence, and generally liable for the slightest negligence; and the degree of care exacted is greater than that to be exercised in respect to a stranger or trespasser. *Carrico v. Railway Co.*, 35 W. Va. 389; 2 Rap. & M. Ry. Dec. Dig. 138-140; 1 Harris, Dam. Corp., § 341; 2 Am. & Eng. Enc. Law, p. 748. Whether the negligence of plaintiff was the proximate cause is a question for the jury. *Sheff v. City of Huntington*, 16 W. Va. 307. Although the general rule is that no man by his wrong-

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ful act can impose a duty on another, yet this does not apply where the efficient, direct, and sole proximate cause of the injury intervenes between the plaintiff's state of negligence and the damage complained of. There is nothing remarkable about this case but the exceptional distinctness with which it exemplifies and makes the reason of this rule. Taking alone the evidence of the conductor, we have a case of the plaintiff in a state of negligence riding on the platform, unconscious of his incapacity to take care of himself, heedless of the danger of falling off. This goes on under the eyes of the conductor from the time plaintiff entered the train until he fell off. His drunkenness was obvious. He was drinking when he came on, and kept drinking as he rode. His recklessness of danger, his heedlessness of the probable consequences of such conduct, were equally obvious, and observed by the conductor; for he saw him standing on the steps, saw him down on the platform with one foot on the step. He requested him to come in, as he says, more than once, and always unavailingly. He saw his brakeman Graves insisting on his going in, who, no doubt, would have succeeded had he been left alone, certainly if he had been authoritatively assisted, but he made Graves desist. The father of the boy told the conductor that his son was drinking, and he was afraid he would fall off, and requested the conductor to make his minor son come in,—bring him in. Here the remote cause, the state of negligence of the passenger thus riding on the platform, the mere condition of the injury, comes to so clear a marking off from the proximate cause of the injury that it is seen at once. In this sharpness with which the remote cause is separated in time and distinctness of efficiency from the proximate cause, the case is indeed remarkable, but not in the rule of law of which it furnishes so striking an illustration.

The conductor, as he says, had twice tried the efficiency of a mere request, without effect. Why did he not exercise the care which the circumstances demanded? 2 Wood, R. R., p. 1426, § 318a. Why did he not discharge the duty which was so obviously dictated, and measured by the exigencies of the occasion? Railroad Co. v. Jones, 95 U. S. 439, 442. The state of danger of the passenger was known to him throughout the whole seven miles. It was expressly brought to his attention by the anxious father, whose request was based on the apprehended intoxication of his son, and his

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exposure to danger. *Isbell v. Railroad Co.*, 27 Conn. 404. Why did he not use the ordinary and necessary precautions for his safety? *Carrico v. Railway Co.*, 35 W. Va. 389; *Fisher v. Railroad Co.*, 39 W. Va. 366. Instead of discharging the plain and imperious duty imposed upon him in such circumstances, he returned to the father, and told him his son was in no danger. Why did he not make him come in? "Bring him in," that was the language of the father's request. Any conductor of ordinary knowledge, care, and prudence, seeing what he saw, would have done so, according to the finding of two juries. But he tells us on this trial that the company had no rule requiring him to make the passenger riding on the platform come in, and, if he refused, stop the train, and put him off. But he needed no rule. The father of the minor had explicitly requested it. He saw for himself the urgent necessity of it; and a statute made for such cases, constituting him a conservator of the peace, authorized and empowered him to command it, and to enforce his command, without regard to any rule of the company. Code, c. 146, § 31. The common law itself makes him a *quasi* officer, clothed *pro hac vice* with such powers amply sufficient to have saved this drunken boy from the consequences of his own folly. But the statute evidently contemplates that such a rule will be made. Code, c. 54, § 34. How came it, we may remark in passing, that this company was running its trains without having this ordinary rule on this important subject? But, in my opinion, it was plainly the right of this conductor to put an end to this passenger's riding on the platform; and, at least, after the request of the father, it was as plainly his duty as his right, unless we are to hold that the exigencies of the occasion then staring the conductor in the face, which dictated and measured the duty, were met by doing only, and that for the third time, what he tells us in his testimony had then become a vain and idle thing. But, in my view, the case turns on no such question as the company then having a rule on the subject. The fact of plaintiff's self-incapacitation by drunkenness, and self-exposure to danger, are the sole grounds put forward for setting aside the verdict and awarding a new trial. These are the very circumstances which constitute the state of negligence, the remote cause, the condition, the occasion, the exigencies of which dictated and measured the duty of the company,

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when brought to its notice in time to avoid and prevent the injury, and to comply with the request of the father. This a conductor of ordinary knowledge, care, and prudence would have done; this the conductor in this case failed and neglected to do. And a jury of good and lawful men, of common sense, of common prudence, of experience in practical affairs, who had learned by observation what competent conductors of ordinary care and prudence do under such circumstances, were, by the issue made up, asked the questions: What was the duty of this conductor on this occasion? what were the exigencies which imposed and measured the duty, if any? and did the conductor discharge the duty of taking ordinary care under the circumstances? This jury, like the first one, found that the duty of taking ordinary care existed, but was not discharged; that the neglect or refusal of the conductor to make this boy come in off the platform, as requested by his father, intervened as the sole efficient and proximate cause of the injury. Who are to judge if not the 12 good and lawful men of common sense and common observation, of what is prudent under such circumstances, under the direction of the learned judge who presides at the trial? On what principle or rule of settled law, where the sole question is, what would a competent conductor of ordinary care and prudence do in such a case (3 Rap. & M. Ry. Dec. Dig., p. 287 *et seq.*), can the defendant ask this second verdict to be set aside? When and how is this litigation to come to an end? Is some essential point wholly without evidence, or does it manifestly appear that this conductor discharged the duty that the exigencies of this case imposed, when he left this drunken boy sitting on the platform, with one foot on the step, and came back and told his father that he was in no danger? No doubt, they had heard the learned circuit judge instruct the jury that if the plaintiff in the given case was drunk, and sitting on the railway track as a trespasser, and his peril was discovered in time by those in charge of the train to have prevented injury, and those in charge of the train did not use proper care and due diligence to avoid the accident, and damage resulted, the defendant company was liable. See *Raines v. Railway Co.*, 39 W. Va. 50; *Railway Co. v. Joyner*, (Va.) 23 S. E. 773; *Bish. Noncont. Law*, § 1037. How is it possible to expect the jury to see and understand why less care is due the drunken passenger who exposes himself to danger than is due

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the stranger or trespasser on the track? We cannot insist on the distinction, if any, between negligence by omission and negligence by commission, for it so happens that in this case we have them both; not only the willful disregard of the father's request, but an active deception practiced upon him, which kept him, we may suppose, for the moment, from looking in his own feeble way after the safety of his son; but that moment was enough, for in less than 10 minutes the boy was thrown off, and both feet were ground off up to the heel.

In my opinion the plaintiff has brought this case within the meaning of the rule as laid down in *Carrico v. Railway Co.*, 35 W. Va. 389 (point 9), and other cases, such as *Isbell v. Railroad Co.*, 27 Conn. 404, cited in *Whart. Neg.*, § 34, and within the true meaning and spirit of the rule laid down in this case, when here before, when read, as it must be, in connection with the above-named Case of *Carrico*, cited therein with approval. See *Fisher v. Railroad Co.*, 39 W. Va. 366 (point 3).

(1) If the conductor has used the ordinary precautions for the safety of his passenger, such as was dictated and measured by the occasion, seeing, as the conductor did, his dangerous position and conduct therein, and his insensibility to and reckless disregard of such danger, the resulting injury would have been prevented and avoided. (2) If the conductor had properly aided his brakeman Graves in his effort to make the drunken passenger go in off the platform, instead of commanding him to desist, the injury would have been prevented. (3) If the conductor, seeing the condition, the place of riding, the conduct, and the manner of the accident, as we see it by his testimony, of this passenger, 20 years of age, and under the control of his father, had heeded his request to bring him in, instead of misleading him as to the danger of his son, and thus throwing his actual guardian off his guard, the accident, in all likelihood, would not have happened.

To sum up: We have endeavored to show that the rule which governs this case is, if defendant had notice of plaintiff's condition of drunkenness and dangerous position, but did not use ordinary care and diligence, such as was dictated and measured by the exigencies of the occasion, to prevent the injury, he is liable. This rule is supported by authority, and is based upon the broad principle of being in accord with our common sense of right and justice and of humanity, and to

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that extent it becomes abiding law. As far as I can see, this case is not withdrawn from the operation of the rule by any other, based on public policy or on general convenience. The maxim, "To him who consents no injury is done," does not apply; for this passenger, when thrown off, had reached the stage of having no rational will and no appreciation of his danger, as his conduct, exhibited to us through the eyes of the conductor of the train, abundantly shows. This rule, applied to the facts of this case, requires that the judgment rendered should stand, in which is impliedly contained at least the following narrow point of law, which is all that the justification of the verdict of the jury requires (how much broader point of law it may comprehend we have no need to say): When the conductor sees a drunken passenger, 20 years of age, riding continuously on the platform, and is requested by the father to bring him in, and, instead of taking such ordinary precautions for the safety of the boy as the circumstances known to him required, leaves him there, and, by misrepresentation as to his danger, throws the natural, actual guardian off his guard, and the injury complained of occurs by the boy falling from the running train, such conductor has thereby made his company liable for a breach of duty as a common carrier of passengers. Therefore, with all deference for the different opinion of others on this doctrine of the law, so difficult in its proper application, I think we ought to let this judgment stand.

KIRK

v.

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(Supreme Court of Appeals of West Virginia, March 25, 1896.)

Duty of Railroad Company to Avoid Injury to Stock.—Where a railroad company leaves its railroad uninclosed through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals getting upon the railroad track, it is the duty of the railroad company, through its agents, to use at least ordinary care to avoid unnecessary injury to the animals, when found in the way of a train on the road.

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Primary Duty of Railroad Company is to Its Passengers and Freight.—The paramount duty of the agents of a railroad company engaged in propelling a train is owed to the persons and property in their charge on the train; and if, in freezing weather, it is found that the use of salt on switches is the only effective mode of freeing them from ice, and thus protecting their passengers and themselves from the dangers consequent upon a wreck, they may avail themselves of this method, although it may have a tendency to lure stock to the track, and endanger their lives.

Duty of Railroad Company in Respect to Stock is Subordinate.—If the servants of the railroad company in charge of a train, by exercise of ordinary care, can see and save domestic animals which have wandered on the railroad, it is their duty to do so; but this duty must be exercised consistently with the paramount duties they owe to the passengers on the train under their charge.

ERROR to Logan county circuit court. *Reversed.*

Campbell & Holt, for plaintiff in error.

J. B. Wilkinson, for defendant in error.

ENGLISH, J.—This was a civil action brought by G. W. Kirk against the Norfolk & Western Railroad Company, before T. J. Mead, a justice of the peace of Logan county, for a wrong alleged to have been committed by the defendant, in which damages to the amount of \$300 were claimed. In the complaint filed before the justice, the plaintiff alleged that between the 1st day of October, 1892, and the 1st day of March, 1893, the defendant killed three oxen, and crippled another one, which belonged to the plaintiff, of the value of \$45 each for two that were killed, and \$65 for the other, and \$25 for the one that was crippled. On the 17th day of June, 1893, the case was heard, and judgment rendered for the plaintiff for \$160, with interest till paid and costs. An appeal was taken to the circuit court. An amended complaint was filed. The plea of not guilty was interposed. Issue was joined. A jury was waived, and the matters of law and fact were submitted to the court, and resulted in a finding for the plaintiff, and assessing his damages at \$125. The defendant moved the court to set aside its finding, as contrary to the law and the evidence, and grant it a new trial, which motion the court overruled, and entered judgment for the plaintiff. The defendant excepted, and took a bill of exceptions, setting forth the evidence introduced upon the trial of said cause; and thereupon the defendant applied for and obtained this writ of error.

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Now, the injuries complained of occurred at different times. The evidence shows that about the 15th day of December, 1892, the plaintiff found one of his work oxen had been killed, about 100 yards below the Vinson switch, on the Norfolk & Western Railroad, in Logan county, W. Va. The steer was badly bruised up, and some of its limbs broken, and it was lying by the side of the railroad track. He did not see it killed. It was worth \$40. This was all of the evidence adduced in regard to the killing of this steer. The testimony is entirely silent as to the circumstances under which it was killed. So far as appears, it may have been killed in the night, when it could not have been seen. It may have come suddenly onto the railroad track, and no negligence could properly have been imputed to the defendant; and the burden of proving negligence rests upon the plaintiff, so that, as to this steer, the court surely would not be warranted in assessing any damages against the defendant. Another one of plaintiff's steers was found dead by plaintiff, lying near the railroad track, about two weeks after the first one was killed, at the Breeden switch, in said county, on the line of said railroad. This steer had both of its hind legs broken, and was lying on the switch. He identified the steer, but knew nothing of the circumstances attending the killing. A witness, however, by the name of Ferguson, who resides near the Breeden switch, states that some time in January, 1893, he saw an ox which belonged to the plaintiff struck by a train near said switch; that he heard the train coming down the creek, and looked out of the window of his house, and saw some cattle standing near the track; that one of plaintiff's steers was struck, and thrown off of the main track onto the switch. It was badly crippled, but not killed, and shortly afterwards it was buried by the railroad hands working on that section. This train whistled just before or about the time it came in sight, and was running fast. He heard but the one whistle, which sounded like it was for a whistle post. If any other alarm was given before the steer was struck, he did not hear it. He was about 50 feet from the track where the steer was struck. That stock could have been seen about 175 or 200 yards from the direction of the approaching train. It was a passenger train, and did not appear to slacken its speed either before or after striking the steer. This occurred in the evening. Now, it will be perceived that the cattle, when seen

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by the witness Ferguson, were not on the track, but were standing near it. He was only 50 feet away, and could see the position of the cattle. At what time this steer came onto the track, so as to be in the way of the train, does not appear. He may have been alarmed by the whistle or the noise of the approaching train, and have attempted to cross the track. At any rate, he went onto it, and his hind legs being broken would indicate that he was moving along the track in front of the train, or attempting to leave it. How near the train was when this occurred does not appear, but it must have been very near, as it was a passenger train, and was approaching rapidly, while the ox was changing his position from near the track onto the track itself. From this testimony, we may readily infer that, when the cattle were first seen by the trainmen, they were near the track, but not on it, as Ferguson so places them when he heard the whistle of the rapidly approaching train. The cattle could have been seen, say, for 200 yards; Ferguson says, from 175 to 200. A train running at the rate of 25 miles an hour would run 200 yards in about 15 seconds, which would allow the steer but a quarter of a minute to change his position after the train came in sight; and, as the engineer states, the train could not have been stopped if he had had the entire 200 yards in which to stop after the steer came on the track, but, so far as appears, he must have stepped on the track immediately in front of the train, and no amount of diligence on the part of those in charge of the train could have prevented the collision or the death of the steer. Under these circumstances, we think the court erred in finding against the defendant the value of this steer.

About the 15th of January, 1893, the plaintiff had another steer killed, and a fourth one crippled, at or near Vinson switch, in said county. He did not see it done. The one killed was found lying near the track, and the crippled one was also found near the railroad track. The one killed was worth \$40, and the damage done the crippled one was at least \$25. The only testimony in regard to the circumstances of this last occurrence is that detailed by one William Kirk, who states that he was working near said Vinson switch, hauling saw logs; that a short time before the killing of this last steer and crippling another at said switch, about the 15th day of January, 1893, some salt had been used at said switch, and it attracted the cattle which were being used there to haul saw

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logs; that the railroad at that point, and for some distance above and below, was not inclosed in any way, there being no station or depot, only a switch to receive saw logs on the cars; that, on that evening, he noticed the cattle at the switch, licking where the salt had been used, and he drove them away, fearing a train would come along and kill some of them. After driving them away, he returned to his log shanty, on the opposite side of the creek. A few moments afterwards he heard a train coming down the creek, and stepped out of his shanty, and saw the engine run in among the cattle, which had returned, and were again licking salt at the switch. He went across to the railroad track, and found one ox killed, and one crippled, both of which belonged to plaintiff. He describes the injuries received by the cattle, and says they were both found near the switch, and were part of the cattle which he had a short time before driven away from the switch. This was at or near dusk. The train consisted of a locomotive, baggage car, and two passenger coaches, and was running about 25 miles an hour, and, after striking the cattle, kept on at the same rate without stopping. Stock could have been seen a distance of about 200 or 300 yards on the track from the direction in which said train was approaching. If any alarm was sounded by either bell or whistle, he did not hear it. Now, it will be perceived that there is no evidence that these cattle were on the track at the time this train came in sight of the switch. They had been driven away by the witness Kirk a few minutes before, but when they returned he does not know, and does not state. He states that he saw the engine run in among the cattle when he stepped out of his shanty, but when they returned he does not know or say. So far as the evidence shows, the cattle may have gone on the track immediately in front of the approaching train. If they had been on the track sooner, it must be presumed that self-preservation, if nothing else, would have prompted the trainmen to do their duty by sounding the alarm; and the fact that no alarm was sounded strongly indicates that nothing was seen on the track; and it is incumbent on the plaintiff to show that the cattle were on the track, and were killed and crippled by the negligence of the defendant.

It is contended by counsel for the defendant in error that the use of salt in thawing out the switches, and thus preventing the accumulation of ice from throwing the train from the track or creating such a liability, which had the effect of

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attracting cattle to the switch, was negligence on the part of the plaintiff in error, and cites *Brown v. Railroad Co.*, 27 Mo. App. 394, and *Morrow v. Railroad Co.*, 29 Mo. App. 432, in support of his contention. An examination of said authorities, however, shows a very different state of facts. In the first-named case the railroad company allowed quantities of salt to be piled on and near its track, and to remain there after it knew the salt was there, by reason of which a horse was attracted to it, and killed. In the second case, several merchants had a refrigerator near the railroad track, and the brine running from said refrigerator caused the ground near the railroad to be saturated with brine, which attracted a cow to the track, which was killed. It was shown that the railroad had notice, and had neglected to take any steps to correct it, and this was held to be negligence on the part of the railroad, and that it was liable. It is, however, shown in the case under consideration, that the use of salt at switches is an absolute necessity, to protect the lives of passengers and others that travel on railroad trains, and not to use it would, in case of accident caused by such failure, be regarded as an act of negligence. In the case of *Blain v. Railroad Co.*, 9 W. Va. 252 (point 5 of syllabus), this court held: "There is no law in this state of general operation requiring any person to fence his land uninclosed; but the person who leaves his land uninclosed takes the risks of intrusion thereon by domestic animals of others running at large, and the owner of such animals, in allowing them to run at large, takes the risk of their loss, or of injury to them by unavoidable accident, from any danger into which they may happen to wander." And

**Duty of rail-
road company
to avoid injury
to stock.**

in point 12 the law is thus stated: "Where a railroad company leaves its railroad uninclosed through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals getting upon the railway track, it is the duty of the railroad company, through its agents, to use at least ordinary care to avoid unnecessary injury to the animals when found in the way of a train on the road. The first

**Primary duty
of railroad
company.**

and paramount duty of the agents of the company is a due regard for the safety of the persons and property in their charge on the train, for which they are held to a high degree of care; and, so far as consistent with this paramount duty, they are bound to the

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exercise of what in that particular business would be ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon this uninclosed road; and if the servants of the railroad company in charge of a train can, by exercise of ordinary care, see and save domestic animals which have wandered on the railroad, it is their duty to do so; and for any injury to animals arising from a neglect of such care the company is liable in damages to the owner." See, also, *Baylor v. Railroad Co.*, *Id.* 271, where this court held it to be the duty of the servants of the railroad company, so far as consistent with their other and paramount duties, to use ordinary care to avoid injuring cattle on the track. They are bound to adopt the ordinary precautions to discover danger, as well as avoid its consequences after it becomes known. And, applying these principles to the facts and circumstances of this case, we conclude that the court erred in fixing any liability upon the defendant by reason of imputed negligence upon its part.

Duty of railroad company in respect to stock is subordinate.

On appeal, however, to the circuit court, the plaintiff filed an amended complaint, in which he alleged that the defendant, on the last day of January, 1893, unlawfully killed and appropriated to its own use three oxen of the plaintiff, of great value, to wit, of the value of \$125; and the testimony shows that one of said oxen was lying on the Breeden switch, with both of its hind legs broken; and, as it was in good order, he proposed to take charge of it, and use it for beef, but the section foreman refused to let him have it, and the steer was buried by said foreman, and workmen under his control. The witness also states that this steer was worth \$60; but as we cannot say whether this valuation applied to the steer in its crippled and mutilated condition, to the value of its carcass for beef, or to the steer as it stood on the railroad when struck by the train, we are of opinion that the circuit court had before it no data by which to determine the value of said steer; and while we are of opinion that the plaintiff was entitled to something for the dead carcass of the steer demanded by him, and refused by the section boss, we cannot determine the amount, and the court below was not warranted on the evidence in fixing any amount.

For these reasons, the judgment complained of must be reversed, the finding set aside, and the case remanded.

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BRANNON, J.—We hold the company not responsible for killing or crippling the cattle, but we think it responsible for not yielding to the owner one of the cattle after it was killed, and demanded by the owner, and, as the complaint called for damages for its conversion, the plaintiff ought to have judgment for that much for its conversion. But no evidence showed its value when dead, and therefore only nominal damages could be given for it. As we do not know how much to subtract for that steer from the amount of damages found against the company, and could only subtract nominal damages, we cannot say the amount of grievance to the company is reduced below the jurisdictional amount of \$100.

DENT, J.—I dissent from the conclusion in this case, for the reason that in my view of it the plaintiff was entitled to recover not less than \$30, which would reduce the residue of the recovery below the jurisdiction of this court, and therefore the appeal, in any event, should have been dismissed for want of jurisdiction, in accordance with the settled rule established in the case of *Love v. Pickens*, 26 W. Va. 341, as follows, to wit: "To give this court jurisdiction in a cause involving matters simply pecuniary, the record must show not only that the party complaining has been prejudiced by the decree or judgment of the inferior court, but also that the amount in controversy in this court exceeds the value of \$100, exclusive of costs." In short, every presumption in this court is in favor of the judgment, and the duty devolves upon the party complaining to show that he is prejudiced in excess of one hundred dollars. If he falls one cent short, he is not entitled to his appeal. *Greathouse v. Sapp*, 26 W. Va. 87; *Neal v. Van Winkle*, 24 W. Va. 401; *Bee v. Burdett*, 23 W. Va. 744; *Rymer v. Hawkins*, 18 W. Va. 309.

But the merits of this case are with the plaintiff. It is the law that in the country where the railroad is not fenced, and cattle are legally permitted to run at large, the company must use at least ordinary care to prevent the injury of stock wandering on the track. The use of salt or anything that attracts stock upon the track is not ordinary care. If the company would merely scatter the salt along its tracks without excuse for so doing, no one would for an instant pretend that such conduct was not negligence, in the highest degree criminal,

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creating a nuisance or trap to lure such domestic animals whose systems crave salt to their certain destruction. The company having done this, the question is, has it furnished an unavoidable, justifiable, and reasonable excuse for so doing? It introduced a witness Moloney, who testified, "that he was in the employ of the defendant as road supervisor on the Kenova Division of said railroad, from Kenova to the mouth of the Pigeon; that the road where the injuries complained of occurred was under his supervision; that in cold, frozen, snowy weather the frogs at switches along said line of railroad would get frozen up, and would become dangerous to run trains along said road; that there had been some cold, snowy weather in December, 1892, and that he applied to the superintendent of the division for salt to apply to said switches, by which means they could be kept open, to avoid danger to running trains; that the superintendent refused to send it, unless it was absolutely necessary to use it, as the use of it would attract stock; that some time in January, during a severe spell of weather, it became absolutely necessary to use salt, for the safety of the trains, and several barrels were sent to him to use along his division, and that he distributed it along the line of said road, to be used at the switches and stations, and it was so used, part of it being used at the said Vinson switch prior to the killing and crippling of the steers, about January 15, 1893; that the use of said salt was absolutely necessary for safety to trains; and that there was no substitute for it." This testimony shows that the company were fully aware of the danger of using salt, but the witness says that its use was absolutely necessary to keep the frogs and switches free from ice and snow in cold weather, and that there was no substitute for it. Admitting this to be true, then it was the duty of the company, in using it, to provide against the danger thereof, by providing, by necessary fencing or watchmen, to keep stock away from it, not only for the safety of the stock, but of the trains and passengers under its control; for stock, dead or alive, may derail a train as well as ice or snow, and, if a train should have been thus derailed, could the company have escaped liability to injured passengers by showing that the salt which attracted the stock, and caused the accident, was necessarily used in providing for their safety? Such a plea would be treated as ridiculous, on the theory that the

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company, in providing against a lesser evil, had no right to incur a greater, but that it also should have provided against the greater if it was in its power to do so; and it certainly was at small expense, comparatively, at least, to the risk it was assuming. In deciding such questions, because of the testimony of witnesses, the court cannot divest itself of good common sense. It is plain to be seen that while the witness says the use of the salt was absolutely necessary, and that there was no known substitute for it, yet that the real object in its use was to avoid the additional expense caused by the necessary labor involved in keeping the frogs and switches free from ice and snow in cold weather. In other words, it was a "penny wise and pound foolish" policy, causing the unnecessary destruction of other people's property, and increasing the dangers to its trains and passengers, which could have been avoided by a small outlay, less than the expense of defending this suit; for it alone will cost the company more than sufficient to have kept these particular frogs and switches free and clean from snow and ice, and properly lubricated, by manual labor, for many winters,—or if the salt was absolutely necessary, which sounds like mere foolishness to an untutored savage at least, to have kept a man on guard for many cold nights and days, and secured the plaintiff and others from the loss of their stock, and avoided a decision by this court of that as law which must be repugnant to the sense of justice of every reasonable man not learned in the intricacies of railroad jurisprudence. To say that the use of salt is the only effective mode of freeing frogs and switches from ice and snow in cold weather is to close our eyes to ordinary human experience. But to say that the use of salt is the only effective mode of freeing frogs and switches from ice and snow in cold weather without an additional expense for manual labor and proper lubricants is, no doubt, true. If the company adopt the cheaper of two modes to accomplish the same purpose, it is no more than justice to require it to provide against the increased danger, occasioned by its choice, to the property of others. If, necessarily, I must maintain for my own benefit that which may be a nuisance to my neighbors, and I can provide against its dangerous character, it is my duty to do so, or be responsible to my neighbor for his loss resulting from my neglect. The company knew that the use of the salt in this instance would result just as it did. It, by a small additional

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expenditure of labor and money, could have provided against it. This it failed to do, and therefore it should be made to pay the damage. In my opinion, the judgment is just, and should be affirmed.

TAYLOR

v.

CHESAPEAKE & O. RY. CO.

(*Supreme Court of Appeals of West Virginia, March 21, 1896.*)

Right of Father to Services of Child.—The father has the right to the custody of his infant child, with the correlative duty of maintenance, from which results his right to the child's services.

Right of Action for Loss of Child's Services.—The father is entitled to maintain an action for loss of services against any one who wrongfully interrupts the rendering of such services, or makes the full rendering of them impossible.

Liability of Railroad for Injury to Employee Under Age.—Where a party knowingly engages a minor in a dangerous employment against the known will of the father, and the minor is injured in such employment, such party is responsible to the father for the consequent loss of the services of the minor.

ERROR to circuit court, Cabell county.

Action by J. A. Taylor against the Chesapeake & Ohio Railway Company. Judgment for plaintiff. Defendant brings error. *Affirmed.*

Simms & Enslow, for plaintiff in error.

L. D. Isbell, for defendant in error.

HOLT, P.—On writ of error to judgment rendered by the circuit court of Cabell county on the 10th day of December, 1894, in favor of plaintiff, Taylor, against the defendant company, for \$350, on demurrer to the evidence by the latter. The evidence set forth in the demurrer shows: That Samuel W. Taylor, deceased, was the son of plaintiff, J. A. Taylor. He was 17 years of age; had earned from \$30 to \$40 per month, which was used by the father in helping to support his family. On the night of the 16th day of December, 1896, the son left his father's house, and, without the knowl-

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edge or consent of the father, the defendant company took him into their employ as front brakeman on a freight train. The conductor at the station at Huntington gave him a switch key, and told the young man to go and put the engine on the train. The young man had never acted as brakeman on the defendant's road, but told the conductor he had braked on the M. V., at Guyandotte. The conductor told him to cut the train from the main line, and couple up some cars; and while the engine was checking up to couple to a car the young man was mashed between the bumpers, and taken back to his father's, in Huntington, where he died at the end of 21 days. The evidence shows that he had no experience whatever of braking on a railroad. The plaintiff had asked the yardmaster at Huntington to give his son employment as call boy, or braking in the yard, but that he did not want him employed as brakeman on the main line; and he said he would give him a place as soon as there was an opening, which would be soon. The son had asked his father's permission to brake on the railroad, and the father had refused. In that way the defendant knew that he was a minor, if not also from his youthful appearance.

The father has the right to the custody of his infant child, with the correlative duty of maintenance, from which there results a right to the child's services. 1 Minor,

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Inst. 429; 1 Bl. Comm. 453; Railroad Co. v. Willis, 83 Ky. 57; Schouler, Dom. Rel. (5th Ed.), § 252. And it follows that the father is entitled

to maintain an action for loss of services against any one who wrongfully interrupts the rendering of them, or

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makes the full rendering of them, during minority, impossible. Bigelow, Torts, 170. Where one

knowingly engages a minor in a dangerous employment, without the father's consent, express or implied,

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and the minor is injured in such employment, he is responsible to the father for the consequent loss of the minor's services. Railway Co. v. Redeker, 75 Tex. 310. This is certainly true when it is

against the known will of the father. Railroad Co. v. Beyerle, 110 Ind. 100, 28 Am. & Eng. R. Cas. 306. See Schouler, Dom. Rel., § 260; Vaughan v. Rhodes, 2 McCord 227, 13 Am. Dec. 713, and notes. But the fact that the loss of services is the gist of the action must be kept steadily in view.

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Sawyer v. Sauer, 10 Kan. 519. Here the jury found a verdict for \$350, subject to the judgment of the court on defendant's demurrer to the evidence, and as to the amount of the verdict no question is raised. Applying the law as stated above to the facts as they appear from the evidence, the judgment for the plaintiff on the demurrer to the evidence is right, and must be affirmed.

NORTHERN PAC. R. CO.

v.

PETERSON.

(162 U. S. 346.)

Foreman is Fellow-servant with Workmen.—The foreman of a small gang of workmen, engaged in making repairs on a railroad, is a fellow-servant with the men.

IN Error to the United States Circuit Court of Appeals for the Eighth Circuit.

This action was commenced by the plaintiff below (defendant in error) in the United States circuit court for the district of Minnesota, Fourth Division, to recover damages against the defendant alleged to have been sustained on account of its negligence. The plaintiff was in the service of the corporation when the injury was sustained.

The defendant denied any negligence, and set up that whatever injury plaintiff below sustained was caused by his own neglect and carelessness.

The case came to trial, and evidence tending to show the following facts was given: The plaintiff was a day laborer, and he and several others, in July, 1890, were at a place called "Old Superior," a station on the line of the defendant's road. They had been working on the road at that point, but, work becoming scarce, they had applied to one Mongavin, who was a roadmaster of the defendant, and at that time stationed at Old Superior, for employment. Mongavin told them he had no more work for them there, but he would send them up to Poplar, and they could go to work there, if they wanted to; that they could go up there and go on an

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extra gang that Holverson was running. He furnished them with passes to Poplar, and the men went up, and were placed at work by Holverson, on his extra gang. The work which was to be done was repairing the road and roadbed, putting in new ties where necessary, and work of that general nature.

After the plaintiff and his companions were employed by Holverson on the extra gang, it then amounted, in numbers, to 13 men, with Holverson as foreman. The extra gang had duties precisely of the same kind as those pertaining to the regular section gang which was employed on each section of the road to keep the same in repair. The road was divided into sections of about six miles in length, and the purpose of the extra gang was to help out the other gangs when the work on their sections became too much for the regular gang to do. Each section had a section foreman or boss, under whom the section gang worked. The extra gang over which Holverson had charge, and into which plaintiff and his associates entered, instead of confining its assistance to one section, worked, where necessary, over a distance of three sections. Holverson had power to employ men, and also to discharge them. The tools used by the men in repairing the road were furnished by the company. They were sent to Holverson, who gave them to the men as they required them. The men were stationed at Poplar, and were taken each morning on hand cars to the place where they were to work during the day, and, when the work was finished, were brought back. The members of the gang themselves worked the hand cars; Holverson generally occupying a place on the front hand car, and taking care of the brakes, and applying them when thought necessary. He always went with the gang, superintended their work, even if taking no part in the actual manual labor, and came home with them at the end of the day's labor.

About a month after plaintiff had been working in this extra gang, and on the 19th of August, 1890, while returning on the hand car, with the rest of the gang, from the day's work, the accident out of which this suit arises occurred. Holverson occupied his accustomed place on the front hand car, at the brakes. The plaintiff and several of his associates were on the same car. The second car was occupied by the remainder of the gang. While proceeding around a curve on the track, Holverson thought he saw some object in front of him, and he applied his brakes, as was said, very suddenly,

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in consequence of which the car was abruptly stopped. He gave no warning of his intention, and the rear car was following so closely that it had no chance to stop before running into the car ahead, the result of which was that the first car was thrown from the track, throwing plaintiff off the car, and injuring his leg, by having the rear car run over it.

It was alleged that the brakes on the rear car were defective, and that on that account the rear car could not be stopped as readily as it would otherwise have been. This issue was not insisted upon, and was not, in fact, submitted to the jury. There is also evidence that the hand cars were being run at the unusual rate of speed of from 12 to 15 miles an hour. Other evidence was given in regard to the nature of the wound, and the alleged neglect of Holverson, and the injuries sustained by plaintiff below.

The court, among other things, charged the jury as follows:

“ The plaintiff claims his injuries resulted from the negligent act of Holverson, who was the defendant’s foreman of an ‘ extra gang of laborers,’ of whom the plaintiff was one, working on the defendant’s road.

“ The defendant claims they resulted from the negligence of the plaintiff’s fellow servants, and also claims that Holverson was a fellow servant of plaintiff. Whether he was so, or not, depends on the relation he sustained to the defendant company, and the court instructs you that if you find from the evidence that Holverson was a ‘ foreman on extra gang ’ for the defendant company, and that as such foreman he had the charge and superintendency of putting in ties, and lining and keeping in repair three sections of the defendant’s road; that he hired the gang of hands, about thirteen in number, to do this work for the company, and had the exclusive charge and direction and management of said gang of hands in all matters connected with their employment, and was invested with authority to hire and discharge the hands to do said work at his discretion; and that plaintiff was one of the gang of hands so hired by Holverson, and that the plaintiff was subject to the authority of Holverson in all matters relating to his duties as a laborer,—then the plaintiff and Holverson were not fellow servants, in the sense that will preclude the plaintiff from recovering from the railroad company damages for any injury he may have sustained through the negligence of Holverson, acting in the course of his employment as such foreman.

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“ If you find Holverson was not a fellow servant of the plaintiff, but representing the company, then, as was well observed by counsel for defendant, the question, under the evidence in the case, for your determination, is, was the injury the result of the negligent act of Holverson, the defendant's agent, who was riding on, and had charge of, the front hand car, or was it the negligence of the hands who were on and operating the hind car? If the negligence of the men on the hind car occasioned the accident, the defendant is not liable; but, if the accident resulted from the negligent act of Holverson, the defendant is liable.

“ You have heard the evidence relating to the functions and duty of Holverson and the hands at work under him, and, upon a full and fair consideration of all that evidence, you will determine whose negligent act occasioned this accident.”

Counsel for the defendant below asked the court to charge the jury on the question of defective brakes, but, after some conversation between counsel and the court, the court stated:

“ You do not want to charge further than the issues in the case. There is nothing about the brake in the case. It all reduces itself to this: If you find, under my charge, that Holverson was not a fellow servant of the plaintiff, then the question is, through whose negligent act did this injury occur? Was it the act of Holverson, the foreman, who was on the front car, or was it the negligent act of plaintiff's fellow servants on the hind car? If it was the act of Holverson, then the plaintiff is entitled to the agreed amount. If it was the act of the men on the hind car, then plaintiff cannot recover, and your verdict must be for the defendant.”

Exceptions were duly taken to the refusal to charge as requested by counsel for the defendant below, and to the charge as above given.

The jury returned a verdict in favor of plaintiff. Upon writ of error the United States circuit court of appeals for the Eighth circuit affirmed the judgment (Northern Pac. R. Co. v. Peterson, 51 Fed. Rep. 182), and the defendant below sued out this writ of error.

W. J. Curtis and C. W. Bunn, for plaintiff in error.

Henry J. Gjertsen, for defendant in error.

Mr. Justice PECKHAM, after stating the facts, delivered the opinion of the court.

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The sole question for our determination is whether Holverson occupied the position of fellow servant with the plaintiff below. If he did, then this judgment is wrong, and must be reversed.

By the verdict of the jury, under the charge of the court, we must take the fact to be that Holverson was foreman of the extra gang for the defendant company, and that he had charge of and superintended the gang in the putting in of the ties, and assisting in keeping in repair the portion of the road included within the three sections; that he had power to hire and discharge the hands in his gang, then amounting to 13 in number, and had exclusive charge of the direction and management of the gang in all matters connected with their employment; that the plaintiff below was one of the gang of hands so hired by Holverson, and was subject to the authority of Holverson in all matters relating to his duties as laborer. Upon these facts the courts below have held that the plaintiff and Holverson were not fellow servants, in such a sense as to preclude plaintiff recovering from the railroad company damages for the injuries he sustained through the negligence of Holverson, acting in the course of his employment as such foreman.

In the course of the review of the judgment by the United States circuit court of appeals, that court held that the distinction applicable to the determination of the question of a co-employé was not "whether the person has charge of an important department of the master's service, but whether his duties are exclusively those of supervision, direction, and control of a work undertaken by the master, and over subordinate employés engaged in such work, whose duty it is to obey, and whether he has been vested by the common master with such power of supervision and management." Continuing, the court said that "the other view that has been taken is that whether a person is a vice principal is to be determined solely by the magnitude or importance of the work that may have been committed to his charge; and that view is open to the objection that it furnishes no practical or certain test by which to determine, in a given case, whether an employé has been vested with such departmental control, or has been 'so lifted up in the grade and extent of his duties,' as to constitute him the personal representative of the master. That this would frequently be a difficult and embarrassing question

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to decide, and that courts would differ widely in their views, if the doctrine of departmental control was adopted, is well illustrated by the case of *Borgman v. Railway Co.*, 41 Fed. 667, 669. We are of the opinion, therefore, that the nature and character of the respective duties devolved upon and performed by persons in the same common employment, should, in each instance, determine whether they are, or are not, fellow servants, and that such relation should not be deemed to exist between two employés, where the function of one is to exercise supervision and control over some work undertaken by the master which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management." *Northern Pac. R. Co. v. Peterson*, 51 Fed. Rep. 182. The court thereupon affirmed the judgment.

It seems quite plain that Holverson was not the "chief" or "superintendent" of a separate and distinct department or branch of the business of the company, as such term is used in those cases where a liability is placed upon the company for the negligence of such an officer. We also think that the ground of liability laid down by the courts below is untenable.

The general rule is that those entering into the service of a common master become thereby engaged in a common service, and are fellow servants; and, *prima facie*, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery, and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employé, and, if the employé suffer damage on account thereof, the

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master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which in such case is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such.

In addition to the liability of the master for his neglect to perform these duties, there has been laid upon him by some course a further liability for the negligence of one of his servants in charge of a separate department or branch of business, whereby another of his employes has been injured, even though the neglect was not of that character which the master owed in his capacity as master, to the servant who was injured. In such case it has been held that the neglect of the superior officer or agent of the master was the neglect of the master, and was not that of the co-employé, and hence that the servant, who was a subordinate in the department of the officer, could recover against the common master for the injuries sustained by him under such circumstances. It has been already said that Holverson sustained no such relation to the company, in this case, as would uphold a liability for his acts based upon the ground that he was a superintendent of a separate and distinct branch or department of the master's business. It is proper, therefore, to inquire what is meant to be included by the use of such a phrase.

A leading case on this subject in this court is that of Railway Co. v. Ross, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501. In that case a railroad corporation was held responsible to a locomotive engineer in the employment of the company for damages received in a collision which was caused by the negligence of the conductor of the train drawn by the engine upon which plaintiff was engineer. This court held the action was maintainable on the ground that the conductor, upon the occasion in question, was an agent of the corporation, clothed with the control and management of a distinct department, in which his duty was entirely that of direction and superintendence; that he had the entire control and management of the train, and that he occupied a very different position from the brakemen, porters, and other subordinates employed on it; that he was in fact, and should be treated as, a personal representative of the corporation, for whose negligence the

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corporation was responsible to subordinate servants. The engineer was permitted to recover on that theory. These facts give some indication of the meaning of the phrase.

In the above case the instruction given by the court at the trial, to which exception was taken, was in these words: "It is very clear, I think, that if the company sees fit to place one of its employes under the control and direction of another, that then the two are not fellow servants engaged in the same common employment, within the meaning of the rule of law of which I am speaking." That instruction, thus broadly given, was not, however, approved by this court in the Ross Case. Such ground of liability—mere superiority in position, and the power to give orders to subordinates—was denied. What was approved in that case, and the foundation upon which the approval was given, is very clearly stated by Mr. Justice BREWER in the course of the opinion delivered in the case of Railroad Co. v. Baugh, 149 U. S. 368, 380, 54 Am. & Eng. R. Cas. 328, and the following pages. In the Baugh Case it is also made plain that the master's responsibility for the negligence of a servant is not founded upon the fact that the servant guilty of the neglect had control over, and a superior position to that occupied by, the servant who was injured by his negligence. The rule is that, in order to form an exception to the general law of nonliability, the person whose neglect caused the injury must be "one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department." This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case.

When the business of the master or employer is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered, with respect to employes under them, vice principals and representatives of the master, as fully and as completely as if the entire business of the master were placed by him under one superintendent. Thus, Mr. Justice BREWER, in the Baugh Case, illustrates the meaning of the phrase "different branches or departments of service" by suggesting that "between the law department of a

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railway corporation and the operating department there is a natural and distinct separation,—one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So, oftentimes, there is, in the affairs of such corporation, what may be called a manufacturing or repair department, and another strictly operating department. These two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service—who alone superintends and has the control of it—is, as to it, in the place of the master.” The subject is further elaborated in the case of *Howard v. Railroad Co.*, 26 Fed. Rep. 837, 24 Am. & Eng. R. Cas. 448, in an opinion by Mr. Justice BREWER, then circuit judge of the eighth circuit. The other view is stated very distinctly in the cases of *Borgman v. Railroad Co.*, 41 Fed. Rep. 667, and *Woods v. Lindvall*, 48 Fed. Rep. 62. This last case is much stronger for the plaintiff than the one at bar. The foreman in this case bore no resemblance, in the importance and scope of his authority, to that possessed by Murdock in the Woods Case, *supra*. These cases which have been cited serve to illustrate what was in the minds of the courts when the various distinctions as to departments and separate branches of service were suggested. In the Baugh Case the engineer and fireman of a locomotive engine running alone on the railroad, and without any train attached, were held to be fellow servants of the company, so as to preclude the fireman from recovering from the company for injuries caused by the negligence of the engineer.

The meaning of the expression “departmental control” was again, and very lately, discussed in *Railroad Co. v. Hambley*, 154 U. S. 349, where it was held, as stated in the head note, that a common day laborer, in the employ of a railroad company, who, while working for the company, under the orders and direction of a section boss or foreman, on a culvert on the line of the company’s road, receives an injury through the neglect of a conductor and an engineer in moving a particular passenger train upon the company’s road, is a fellow servant of such engineer and of such conductor, in such a sense as exempts the railroad company from liability for the injury so inflicted.

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The subject is again treated in *Railroad Co. v. Keegan*, 160 U. S. 259 (decided at this term), where the men engaged in the service of the railroad company were employed in uncoupling from the rear of trains cars which were to be sent elsewhere, and in attaching other cars in their place; and they were held to be fellow servants, although the force, consisting of five men, was under the orders of a boss who directed the men which cars to uncouple and what cars to couple, and the neglect was alleged to have been the neglect of the boss, by which the injury resulted to one of the men. This court held that they were fellow servants, and the mere fact that one was under the orders of the other constituted no distinction, and that the general rule of nonliability applied.

These last cases exclude, by their facts and reasoning, the case of a section foreman from the position of a superintendent of a separate and distinct department. They also prove that mere superiority of position is no ground for liability.

This boss of a small gang of 10 or 15 men, engaged in making repairs upon the road, wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work of the master, as would be necessary to render the master liable to a co-employé for his neglect. He was in fact, as well as in law, a fellow workman. He went with the gang to the place of work in the morning, stayed there with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the hand car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it become almost a necessity that one should be boss, and the other subordinate, but both are, nevertheless, fellow workmen.

If, in approaching the line of separation between a fellow workmen and a superintendent of a particular and separate department, there may be embarrassment in determining the question, this case presents no such difficulty. It is clearly one of fellow servants. The neglect for which the plaintiff has recovered in this case was the neglect of Holverson in not taking proper care at the time when he applied the brake to

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the front car. It was not a neglect of that character which would make the master responsible therefor, because it was not a neglect of a duty which the master owes, as master, to his servant, when he enters his employment.

It is urged, however, in this case, that this judgment may be sustained upon another and distinct proposition. The counsel for the defendant in error says that it is alleged in the amended complaint "that, as a part of the contract of hiring, the defendant engaged to carry the plaintiff to and from his work upon the defendant's road as occasion should require, in a safe and proper manner." He then argues that the defendant having, as a part of its contract of hiring, assumed the obligation to carry safely, it was bound to exercise the same degree of care in its discharge as in any positive duty recognized or imposed by law, and that, therefore, the negligence of Holverson in the performance of his duty, whether it be from the relation of master and servant, or one specially assumed under the contract of hiring, was a neglect of the master.

Although this allegation is contained in the complaint, it is denied in the answer; and there is no proof of any contract on the part of the defendant below to carry the plaintiff safely, further than is to be inferred from the fact that the company furnished hand cars which were worked by the gang, and upon which they rode to and from the place of labor. If, under these circumstances, the servant be injured through the neglect of a fellow servant, such as appears in this case, the master is not liable.

The charge of the court to the jury in the matter complained of was erroneous, and the judgment must therefore be reversed, and the case remanded, with directions to grant a new trial.

Mr. Chief Justice FULLER, Mr. Justice FIELD, and Mr. Justice HARLAN dissent.

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NORTHERN PAC. R. CO.

v.

CHARLESS.

(162 U. S. 359.)

Trainmen and Laborers on Roadbed are Fellow-servants.—Railroad laborers employed under a foreman in keeping a portion of the track in repair are fellow-servants with employees upon a freight train.

Laborer and Foreman are Fellow-servants.—A laborer employed under a section foreman in keeping a portion of the track in repair is a fellow-servant with such foreman.

IN error to the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. Bunn, for plaintiff in error.

Reese H. Voorhees, for defendant in error.

Mr. Justice PECKHAM delivered the opinion of the court.

The plaintiff below was an ordinary day laborer, employed, under a section boss or foreman, to keep a certain portion of the roadbed of the defendant in repair. The foreman had power to employ and discharge men, and to superintend their work, and was himself a workman. He employed the plaintiff, who, with the rest of the men employed in the gang,—some four, five, or six,—was carried to and from his work, daily, on a hand car worked by the men themselves.

In August, 1886, on the 28th of the month, an accident occurred as the men were on their way to their work. They were using a hand car with what is alleged to have been a defective brake. The foreman had complained of it to the yardmaster a short time before, who had promised a better one. In the meantime, and as a temporary makeshift, the foreman had provided the car with a brake which consisted of a bit of wood, 4x4, fastened on the side of the car with a bolt; and the long arm acted as a lever, and pressed the shorter portion of the timber against the wheel. In that way the car

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had been run for a day or two before the morning of the accident. On that day the plaintiff, with the rest of the men in the gang, and the foreman, started on the hand car to go over a certain portion of the section to inspect the condition of the road. They were running the car very rapidly, under the direction and supervision of the foreman, and had arrived at a narrow cut in the road, around a curve, when they were suddenly confronted with a freight train coming through the cut in the opposite direction. There had been no warning or signal of any kind given by any of the employés on the freight train of its approach, and plaintiff below knew nothing of the fact that any freight train was expected. Efforts were made to stop the hand car, and, as the speed did not seem to be slackened in time, plaintiff became frightened, and undertook to jump from the front end of the car, when he stumbled over some tools that were on the car, and fell between the rails in front of it. As the hand car approached him he put his foot up against it, in order to prevent its running over him; but the impetus of the car was too great, and it ran over and doubled him up, and wrenched his spine, causing him great internal injuries. The other hands jumped off the car, removed it from the track, and took the plaintiff out of danger, before the freight train passed by.

The injuries of the plaintiff were of a very serious nature, and his legs became paralyzed, and he was rendered a cripple for life. He commenced this action against the defendant below to recover damages on account of the negligence of the agents and servants of the defendant. The negligence claimed consisted in:

(1) The defective brake on the car, which it is alleged was an appliance for the prosecution of the work on the defendant's road, and necessary to be used to enable the employés to perform their duties, and that, as such appliance, it was the duty of the defendant to see that it was reasonably safe and fit for the purpose intended.

(2) The negligence of the foreman in charge of the gang, who directed the speed of the hand car, and ran it at a hazardous rate of speed, when he knew that a train coming towards him was expected, while the other members of the gang were ignorant of that fact.

(3) The negligence of the train hands on the approaching train, in giving no signals of their approach around the curve

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and through the cut, although they were near a public crossing, and some signals were necessary on that account.

Upon the trial evidence was given tending to prove the above facts, and among other things the judge charged the jury as follows:

“ I think that the case, when stripped of all the side issues and the incidental questions surrounding it, resolves itself into just this question for this jury to determine: Whether the injury to the plaintiff resulted directly from the negligence of the defendant in needlessly exposing him to the danger of being hurt by a collision between the hand car and the extra freight train at the place where it occurred, or whether the injury was a mere accident, which was the result of one of the ordinary hazards of the employment in which he was engaged; whether it was an ordinary risk of his employment, or whether an extraordinary danger caused by the negligence on the part of the defendant; whether that negligence was a negligence of the foreman in running the hand car too fast up to a point which he knew to be dangerous, and which he did not warn the other men working on the hand car of, so that it was impossible for them, without extreme hazard to their lives, to avoid a collision; or whether the negligence was on the part of the officers in charge of the freight train, in approaching a curve in the cut, which obstructed the train from view, or passing a public crossing, without giving warning by sounding the whistle or engine bell.

“ If, in any of these respects, there was actual neglect on the part of defendant which placed the plaintiff in a situation of extraordinary danger,—something clear beyond the ordinary risks of his employment,—and his injury was not in any degree owing to his own negligence at the time, the defendant would be liable to damages.”

The defendant below excepted to each of the above propositions, as laid down by the learned judge in his charge, and the jury rendered a verdict in favor of the plaintiff, which was affirmed by the circuit court of appeals for the Ninth circuit (*Northern Pac. R. Co. v. Charless*, 51 Fed. Rep. 562, 51 Am. & Eng. R. Cas. 198), and the defendant below sued out a writ of error from this court to review the judgment.

Many of the facts surrounding the happening of this accident are similar in their nature to those existing in the case of

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Railroad Co. v. Peterson, 162 U. S. 346.* The employment of the plaintiff below, the nature of the work, and the powers of the section boss under whom he worked are substantially the same as those existing in the other case. We may refer to the general principles of the law of master and servant applicable to these facts which are set forth in the opinion of this court in that case, and which we think govern the case at bar, upon those facts.

In regard to the particular allegations of negligence above set forth, it is not necessary, in the view we take of this case, to express any opinion whether the alleged defect in the brake on the hand car rendered it a defective appliance, within the meaning of the law rendering the master liable for a failure to provide a reasonably safe and proper appliance for the work to be done by his employés.

There were two other propositions submitted to the jury by the learned judge, each of which was, as we think, of a material nature, and also clearly erroneous.

1. We think it was error to submit to the jury the question of the negligence of the employés on the extra freight train in failing to give the signals of its approach. This failure, assuming that it constituted negligence, was nothing more than the negligence of co-servants of the plaintiff below in performing the duty devolving upon them. The principle which covers the facts of this case was laid down in *Randall v. Railroad Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243, and that case has never been overruled or questioned. The *Ross Case*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, is a different case, and was decided upon its own peculiar facts. See *Railroad Co. v. Baugh*, 149 U. S. 368, 380, 54 Am. & Eng. R. Cas. 328. Among the latest expressions of opinion of this court in regard to views similar to those stated in the case in 109 U. S., *supra*, is the case of *Railroad Co. v. Hambly*, 154 U. S. 349. It seems to us that the *Randall* and the *Hambly Cases* are conclusive, and necessitate a reversal of this judgment. In the *Hambly Case* it was held that a common day laborer, in the employ of a railroad company, who, while working for the company, under the orders and direction of a section boss or foreman, on a culvert on the line of the company's road,

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* See preceding page.

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received an injury through the negligence of a conductor and of an engineer in moving a particular passenger train upon the company's road, was a fellow-servant with such engineer and with such conductor, in such a sense as exempts the railroad company from liability for the injury so inflicted. We are unable to distinguish any difference in principle arising from the facts in these two cases.

The question of the negligence of the hands upon the extra freight train should not have been submitted to the jury as constituting any right to a recovery against the corporation on the ground of such negligence.

2. We also regard it as erroneous to have submitted to the jury the general question whether Kirk, the section foreman, was negligent in running his hand car at too high a speed just prior to the accident. Kirk and the plaintiff below were co-employés of the company, and the neglect of Kirk, if it existed, in driving his hand car too fast (assuming it was in proper condition), was not such negligence as would render the company responsible to Kirk's co-employé. It was not the neglect of any duty which the company, as master, was bound itself to perform. This we have held in the Peterson Case, and for the reasons there stated. While it may be assumed that the master would have been liable if a defective brake had been the cause of the accident, yet the defendant below is, under the charge of the judge, permitted to be made liable by proof of the speed of the hand car, if the jury found that Kirk, the foreman, knew it to be dangerous, and that the accident happened because of that speed, even though it would have happened if the brake had been the regular kind, and in good order. The language of the court does not separate the question of general negligence in running a hand car which was in good order, too fast, from that which might be negligence with reference to running a hand car with a defective brake at the same rate of speed. For using in a negligent manner a defective appliance furnished by the master, the latter might be liable, if a co-employé were thereby, and in consequence thereof, injured. As the master furnished the defective appliance, it would be no answer to say that it was negligently used. But, on the other hand, the master would not be responsible for the negligent use of a proper appliance. From the language used by the court, the company might

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have been held liable if Kirk were running the hand car at a dangerous rate of speed, although the jury found the brake actually used to have been sufficient. A dangerous rate of speed was therefore held to be negligence, for which the company would be liable. But it is said that the fact of a dangerous rate of speed is necessarily so mingled and intimately connected with the fact of a defective brake that it is impossible to regard the speed separate and distinct from the defect, so that, when the question of excessive speed was submitted to the jury as a possible foundation for the finding of negligence, it was, in substance and effect, a submission to the jury of the question of excessive speed in the particular case of a hand car supplied with a defective brake. We think this is not an answer to the objection, and that there was error in submitting the question of excessive speed to the jury in the manner in which it was done in this case. From the evidence set forth in the record, it is clear that the jury might have taken the view that the temporary brake was, while it lasted, as adequate for the purpose as any other, but that the hand car, assuming it was in good order, was negligently run at a dangerous rate of speed, so that it could not have been stopped in time, even if it had been supplied with a regular brake. In that event, under the judge's charge, the jury might have held the company responsible for the mere negligence of the foreman, Kirk, in running a hand car adequately supplied at a dangerous rate of speed. That neglect, we hold, the company was not responsible for.

Upon the other question of the negligence of the employés on the freight train, the error in the charge is not rendered harmless by any explanation given by the learned judge. The difficulty remains uncured. The jury might have found from the evidence that this hand car, while going at the rate of speed stated, could have been stopped with the extemporized brake in time to prevent any danger of a collision, in case the proper signals had been given by the hands on the freight train, but that the accident resulted from their failure to give those signals, and that such failure was negligence on their part. The verdict may have been based upon such negligence. We hold the company was not liable for the negligence of the hands on the freight train in failing to give proper signals.

These two important and material errors on the part of the

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learned judge who tried the cause, in his charge to the jury, having never been remedied or in any manner cured, we are compelled to sustain the exceptions taken to such charge.

The judgment entered upon the verdict of the jury must be reversed, and the cause remanded, with instructions to grant a new trial.

Mr. Chief Justice FULLER and Mr. Justice FIELD and Mr. Justice HARLAN dissent.

YOUNG

v.

WEST VIRGINIA C. & P. RY. CO.

(Supreme Court of Appeals of West Virginia, April 4, 1896.)

Brakeman Assumes Ordinary Risks of Service.—A party who enters the service of a railroad company as a brakeman takes upon himself the natural and ordinary risks and perils incident to the performance of such services, including the perils arising from the carelessness and negligence of those who are in the same employment as fellow-servants.

Brakemen are Fellow-servants.—If one brakeman on a freight train is injured by the carelessness and negligence of another brakeman upon the same train in the performance of his ordinary duties, they are fellow-servants, and the railroad company is not liable for the injury thus occasioned.

Case at Bar.—Where a brakeman, in attempting to withdraw the coupling pin and uncouple a car from the engine and tender, stands with one foot on the bumper belonging to each car, and, with his lantern in his left hand, leans forward, and reaches with his right to withdraw the coupling-pin, which has already been withdrawn by a fellow-brakeman, and the cars separating cause him to fall between the cars, and to be run over and injured, he must be regarded as negligent, and his negligence must be considered the proximate cause of his injury.

ERROR to Tucker county circuit court. *Reversed.*

C. W. Daily and *L. D. Strader*, for plaintiff in error.

A. B. Parsons and *Dayton & Dayton*, for defendant in error.

ENGLISH, J.—On the 8th day of December, 1891, Charles W. Young brought an action of trespass on the case in the circuit court of Tucker county against the West Virginia

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Central & Pittsburgh Railway Company, claiming damages to the amount of \$30,000 on account of personal injuries received by him while acting as brakeman on one of defendant's freight trains. The defendant demurred to the plaintiff's declaration, and the same was overruled by the court. The plea of not guilty was interposed, and issue was thereon joined, and on the 10th day of March, 1894, the defendant tendered and asked leave to file four special pleas in writing, numbered 1, 2, 3, and 4, which were objected to, and the objections overruled. The pleas were filed, and the plaintiff excepted, and thereupon the plaintiff replied generally to said four pleas, and also tendered two special replications, numbered 1 and 2, to said four pleas, to the filing of which the defendant objected. The court overruled the objection, and allowed said special replications to be filed, and the defendant excepted. The defendant rejoined generally to said special replication No. 2, and asked leave to file a special rejoinder in writing to said special replication No. 1, to which the plaintiff objected, and the objection was sustained, and the defendant excepted, and tendered its bill of exceptions No. 1, setting forth said special rejoinder, which was signed, sealed, and made a part of the record. Said special pleas Nos. 1, 2, 3, and 4, and said special replies Nos. 1 and 2, read as follows:

"Defendant's Special Plea No. 1. For further plea in this behalf the defendant says that the plaintiff ought not to have and maintain this, his action, because, as the defendant avers, that on the 6th day of June, 1891, the said plaintiff received the sum of \$239.17 on account of the injuries of which he complains in this action, \$164.17 of which was paid to him from what is known as the 'West Virginia Central Relief Fund,' which is a fund raised for the benefit of the employes of the defendant company injured while in the discharge of their duties as such employes, to which fund said defendant was a large contributor, and \$75 of which amount was paid directly by the defendant; and on the day aforesaid the plaintiff, in writing, acknowledged the receipt of said sums of money in consideration of the payment of the same to him, released the said defendant from all claims and demands for damages, indemnity, or other form of compensation on account of the injuries complained of in his declaration in this action, and waived any and all claims he might have or be supposed to

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have then or thereafter as growing out of such injuries; and this the said defendant company is ready to verify."

" Defendant's Special Plea No. 2. For further plea in this behalf the defendant says the plaintiff ought not to have and maintain this, his action, because the defendant avers that on the 6th day of June, 1891, the said plaintiff received the sum of \$239.17 on account of the injuries of which he complains in this action from the said defendant company, and on the date aforesaid the plaintiff, in writing, acknowledged the receipt of said sum of money, and in consideration of the payment of the same to him released the said defendant from all claims and demands for damages, indemnity, or other form of compensation on account of the injuries complained of in this declaration in this action, and waived any and all claims he might have or be supposed to have then or thereafter against the said defendant as growing out of said injuries, and this the said defendant company is ready to verify."

" Defendant's Special Plea No. 3. For further plea in this behalf the defendant says the plaintiff ought not to have and maintain this, his action, because the defendant avers that on the 6th day of June, 1891, the said plaintiff received the sum of \$239.17 on account of the injuries of which he complains in this action, which sum of money was paid to him from what is known as the ' West Virginia Central Relief Fund,' which is a fund raised for the benefit of the employes of the defendant company injured while in the discharge of their duties as such employes; to which fund the said defendant was a large contributor, which amount was paid for and on behalf of the defendant company to the said plaintiff; and on the day aforesaid the plaintiff, in writing, acknowledged the receipt of said sum of money, and in consideration of the payment of the same to him released the said defendant from all claims and demands for damages, indemnity, or other form of compensation on account of the injuries complained of in his declaration in this action, and waived any and all claims he might have or be supposed to have then or thereafter as growing out of such injuries. This the said defendant company is ready to verify."

" Defendant's Special Plea No. 4. For further plea in this behalf the defendant says that the plaintiff ought not to have and maintain this, his action, because, as the defendant avers, on the 6th day of June, 1891, the said plaintiff received the sum of 239.17 on account of the injuries of which he com-

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plaintiffs in this action, part of which was paid to him from what is known as the ' West Virginia Central Relief Fund,' which is a fund raised for the benefit of the employés of the defendant company injured while in the discharge of their duties as such employés, to which fund the said defendant was a large contributor, and part of which amount was paid in part directly by said defendant; and on the date aforesaid the plaintiff, in writing, acknowledged the receipt of said sum of money, and in consideration of the payment of the same to him released the said defendant from all claims and demands for damages, indemnity, or other form of compensation on account of the injuries complained of in his declaration in this action, and waived any and all claims he might have or be supposed to have then or thereafter as growing out of such injuries; and this the said defendant company is ready to verify."

" Plaintiff's Special Reply No. 1. The plaintiff, for special reply to the special pleas Nos. 1, 2, 3, and 4, filed in this cause by the said defendant, says he ought not to be precluded from maintaining his said action because of the matters in said pleas contained, because he says that on the 6th day of June, 1891, when the said paper writing set forth in said plea was signed by him, the plaintiff, he, the said plaintiff, was an infant under the age of 21 years, and not bound by said writing aforesaid; and the same was repudiated immediately by him, of which repudiation the said defendant had notice. And this he is ready to verify, and wherefore he prays judgment," etc.

" Plaintiff's Special Reply No. 2. And the said plaintiff, for further special reply to the special pleas Nos. 1, 2, 3, and 4, filed by the said defendant, says he ought not to be precluded from having and maintaining his said action by reason of the matters set forth in said pleas; because he says the said paper writing, dated June 6, 1891, was procured to be executed by him by the false, fraudulent, and deceitful representations and concealments of the said defendant by and through its agent, who procured said writing to be executed, to the effect that said writing was nothing more than a receipt for dues due to him as a member of said relief association, and would not in any manner affect or impair any claim, right, or demand which he might have or maintain against said defendant railroad company for the several wrongs and griev-

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ances set forth in the declaration in this case, which said false, fraudulent, and deceitful representations so made by the said defendant by and through its said agent who procured the execution of said writing aforesaid, were at the time believed and relied upon by the plaintiff, and caused him to execute said writing aforesaid; all of which he is ready to verify. Wherefore he prays judgment," etc.

On the 10th day of March the defendant, by its general rejoinders to said two special replications, put itself upon the country. Issue was joined, and the case submitted to a jury, which resulted in a verdict in favor of the plaintiff for \$5,000, and on motion of the defendant the verdict was set aside, and a new trial awarded. On the 15th day of January, 1895, Hon. P. J. CROGAN, special judge, presiding, the plaintiff was granted leave to amend his declaration by striking therefrom these words: "While the said train was standing on the railroad track of the said defendant, and not in motion," which was accordingly done, and the cause was again submitted to a jury, and on the 16th of January, 1895, the jury having fully heard the evidence in chief on the part of the plaintiff, the defendant moved the court to exclude said evidence, on the ground that the same was not sufficient to maintain the issue on the part of the plaintiff, which motion the court overruled, and on the 17th day of January, 1895, after having fully heard the evidence, the defendant, by its attorney, demurred to the evidence, in which demurrer the plaintiff joined, and the court took time to consider said demurrer to the evidence. On the 18th day of January the jury returned a verdict in favor of the plaintiff for \$9,000. On the 19th of the same month the court overruled the defendant's demurrer to the plaintiff's evidence, and thereupon the defendant moved the court to set aside the verdict of the jury because the damages assessed were excessive, which motion the court overruled, and entered judgment on said verdict. To the action of the court in overruling the demurrer to the evidence the defendant excepted, and took a bill of exceptions setting forth the evidence.

As to the demurrer to the declaration, while the language describing the officer or employé who put the train in motion at the time the defendant was stooping to withdraw the coupling-pin is somewhat indefinite and general, we think the charge of negligence on the part of the defendant is sufficiently

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alleged, and the demurrer to the declaration was properly overruled. The special pleas filed by the defendant rely upon the alleged fact that the plaintiff received from the West Virginia Central Relief Fund a certain sum of money, \$75 of which amount was paid by the defendant, and that he acknowledged the receipt thereof, and released the plaintiff from all demands for damages on account of his injuries complained of in this suit; that he received \$239.17 on the 6th day of June, 1891, from the defendant, on account of the injuries of which he complains, and that he, in writing, acknowledged the receipt of said sum, and in consideration thereof released the defendant from all claims for damages. Plea No. 3 alleges that said sum was paid defendant by the West Virginia Central Relief Fund, which sum was paid for the defendant to the plaintiff, and in consideration thereof he released the defendant from all claims and demands for damages, etc. Plea No. 4 alleges that said amount of money was paid partly by said relief fund and part directly by the defendant, and in consideration thereof he released all claims for damages, etc., on account of the injuries complained of. The plaintiff, in his special reply No. 1 to said special pleas Nos. 1, 2, 3, and 4, says he ought not to be precluded from maintaining his action, because, when the writing set forth in said plea was signed by him, he was an infant under the age of 21 years, and not bound by said writing, and that he immediately repudiated it. In special reply No. 2 to said pleas he avers that he was procured to execute said papers by false and fraudulent representations made to him by the defendant through its agent. As to the acts of infants, the law regards them as voidable. The reply avers that he immediately repudiated it. At all events, he must be regarded as having repudiated it when he instituted this suit. As to the time of avoidance by infants of their contracts we find the law stated in 10 Am. & Eng. Enc. Law, 643, under the title "Infants," as follows: "When an infant has conveyed real estate, he cannot affirm or avoid his conveyance on the ground of infancy until he has arrived at the age of majority; but in other transactions, especially where personal property or executory contracts are involved, the infant may avoid at any time." And in the case of *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, we find that court stated the law thus: "The rule that requires an infant who, upon coming of age, repudiates

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a contract executed by him during his minority, and which has been in whole or in part executed by the adult party thereto, to return the property or consideration received, applies only where the infant has the property or consideration at the time he attains full age. If he has wasted or squandered it during infancy, he can repudiate the contract without making a tender thereof." In the notes to that case on page 638 it is said: "It is difficult to see upon what theory of pleading or practice the infant could be required in such an action against him on the contract to restore the consideration, if he wished to take advantage of his infancy, unless a restoration of the consideration be a condition precedent to a disaffirmance, which is very seldom maintained." "The obligation of an infant to restore the consideration received by him under a contract which he claims to disaffirm, where he is a party plaintiff in an action founded on the disaffirmance, has been the subject of a good deal of difference of opinion, and there can hardly be said to be any well-defined rule. It has sometimes been held that a restoration of the consideration, or an offer to restore it, was a condition precedent to a disaffirmance by an infant of his contract, so that there could be no effectual avoidance of it unless this condition had been complied with,"—citing *Kilgore v. Jordan*, 17 Tex. 341; *Stuart v. Baker*, *Id.* 417; *Bingham v. Barley*, 55 Tex. 281. It is, however, further said: "It is safe to affirm the authorities generally do not require the performance of any such condition to a disaffirmance, and, although some of them may say that under certain circumstances an infant cannot disaffirm his contract and maintain an action to recover back the property or money parted with unless he ventures or offers to restore the consideration, yet we take it that all that is meant is that a restoration or an offer to restore is simply a condition to the obtaining of the relief sought, and not to the disaffirmance itself." In the case we are considering there is nothing to show that any portion of the money received remained in the hands of the minor, and under the circumstances he might disaffirm the release without restoring the money received. This brings us to the consideration of the defendant's motion to exclude the plaintiff's evidence. The defendant, however, after making its motion to exclude the plaintiff's evidence, proceeded to introduce its own evidence, and by so doing the defendant waived the questions raised by its motion to exclude

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the evidence. In the case recently decided by this court of *Milling Co. v. Watkins* (W. Va., 1896), 24 S. E. 612, HOLT, P., in delivering the opinion of the court, says: "Each party, at certain stages of the trial, moved the court to exclude the evidence from the jury, but, when this motion was overruled by the court, destroyed its effect as a demurrer to the evidence by introducing further evidence, so that defendant's exception to that ruling, having been thus waived, cannot be considered." And so we must hold in this case that the defendant, after moving to exclude the plaintiff's evidence, having gone on and adduced its own evidence to the jury, thereby waived its exception to the ruling of the court on said motion.

Coming next to the consideration of the demurrer to the evidence, our latest ruling as to the effect of such demurrer is found in the case of *Mapel v. John*, (W. Va., 1896) 24 S. E. 608, recently decided by this court. In that case (point 4 of the syllabus) it is held that: "By demurring to evidence the demurrant is now, under section 9 of chapter 131 [Code], not held to waive any part of his competent evidence; but where it conflicts with that of the other party it will be regarded as overborne, unless it manifestly appears to be clearly and decidedly preponderant. He admits the credit of the evidence demurred to, and all inferences of fact that may be fairly deducible from the evidence, but only such facts as are fairly deducible; and refers it to the court to deduce such fair inferences." The question raised by the demurrer to the evidence and submitted for our consideration is whether the negligence averred and relied upon by the plaintiff in his declaration as entitling him to recover damages from the defendant on account of its negligence is sustained by the proofs in the cause. The plaintiff was the middle brakeman upon the freight train that caused the injury complained of. When we look to the declaration to ascertain upon what grounds he bases his claim for damages, we find that he alleges that the conductor of the said train, who had, under the rules and regulations made by said defendant, full charge and control of said train of cars and the running thereof, whose orders and commands it was his duty to obey, ordered and required him, while the said train was standing on the railroad of the said defendant, and was not in motion, to go to a certain part of said train and uncouple certain ones of the said cars from the train aforesaid, and in obedience to said order of said con-

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ductor, and without any fault or negligence on his part, he did go to said part of said train for the purpose of obeying said command of the conductor, and did attempt to uncouple the said cars from said train, as it was his duty to do under the command of said conductor, and while so engaged in uncoupling or attempting to so uncouple said cars under said order, without any negligence or want of care on his part, the defendant, by and through its employés and superior officers in charge of said train, and without any warning of any kind to the plaintiff so engaged, without negligence or fault of any kind on his part in the discharge of his duty under the said command and order of his said superior officer, did with gross carelessness and negligence, and without any warning to plaintiff, and while the plaintiff was between the said cars for the purpose of uncoupling the same, cause the said locomotive train and cars to be put in sudden rapid and violent motion, whereby the plaintiff, without any fault or negligence on his part, and without his being able to avoid the same, was violently struck by the said cars, knocked down, and run over by the same, and was in consequence greatly wounded, and rendered unfit for manual labor, etc. Are these allegations sustained by the proofs? In seeking the facts immediately connected with the accident which resulted in the injury complained of, there is no one who was better acquainted with the facts than the plaintiff himself, and he says: "The conductor ordered me to uncouple a car next to the engine, and ride it back on the side track, and I told him 'All right.' And there were no one at the switch. I waved them ahead, and run on down to the switch, and opened the switch, and waved them back, and as they came back I put one hand on one bumper, and the other on the other bumper. No handles on that side to get on; and just as I got up, the car parted, and jerked me down, and the engine run over me." He further says he walked down the track a short distance, " * * * and when the train came back to me it wasn't moving very fast; just in an ordinary gait; and I throwed one hand on one bumper and the other one on the other bumper, and drew myself up; straddled the bumpers." Had a lantern in his hand, and when asked what position he was in when the cars separated replied, "One foot on one bumper, and the other one on the other bumper, just in the act of reaching for the pin." When we turn to the testimony of George Manear,

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who was the rear brakeman on the train, we find he was asked to "tell the jury who uncoupled and took out the coupling-pin between the car and the engine at the time and just before Mr. Young was hurt," and replied, "I took out the pin;" and when asked by whose directions, if any one's, he did that, answered: "Well, I knew that the car was to be put in. The conductor had told me." He was then asked, "Told you what?" and answered, "Told me that car was to go in the siding." It appears, then, that the train was in motion in obedience to the signal of the plaintiff himself when he swung himself on the bumpers, and, standing with one foot on the bumper of each car, his lantern in his left hand, he stooped and reached to withdraw the coupling-pin, which had already been withdrawn by his fellow-servant, George W. Manear, without informing plaintiff of the fact, and from some cause the cars separated, and allowed him to fall between the wheels, which crushed his arm and broke his leg. What caused the cars to separate does not appear. It may have been by slacking the speed of the engine. It surely was not done, as alleged in the declaration, "by causing the said locomotive, train, and cars to be put in sudden rapid and violent motion, whereby the said plaintiff, without any fault or negligence on his part, and without his being able to avoid the same, was violently struck by the said cars, knocked down, and run over by the same." Neither can we say the injury was caused by the negligent conduct of the conductor. It was after two o'clock at night. This car was to be left at Thomas, and the conductor ordered the plaintiff "to uncouple a car next to the engine, and ride it back on the side track." This order was one which the conductor in the performance of his duties had a perfect right to give, and it was one of the duties of the plaintiff to carry it into execution. The duties of a brakeman are well known to be attended with as much, or perhaps more, hazard than any position on the train, and when the plaintiff took the place as brakeman on this railroad he assumed the attendant risks; and it appears from the plaintiff's own testimony that, although he had his lantern in his hand, he did not know whether the coupling-pin was there or not when he stooped and reached for it. Several experienced railroad men, who had been engaged as brakemen and conductors from 23 to 25 years, when made acquainted with the conduct of plaintiff on this occasion, pronounce it careless and

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negligent; that he ought not to have attempted to pull the pin without holding to something with the other hand, and that the proper way would have been to back the car into the side track, and uncouple it after the engine stopped. While we cannot consider George W. Manear as free from blame in pulling the pin without informing plaintiff of the fact, we cannot hold the defendant responsible for the negligence of said Manear. The negligence complained of by plaintiff in his declaration is claimed to have occurred after the plaintiff stood on the bumpers between the cars, but no such negligence is shown. If the action of Manear was negligent, it occurred before that time, and so far as the evidence shows, said Manear acted upon his own responsibility. See *Hawker v. Railroad Co.*, 15 W. Va. 629. In the case of *Railroad Co. v. Ross*, 112 U. S. 390, 17 Am. & Eng. R. Cas. 501, Mr. Justice FIELD, in delivering the opinion of the court, says: "We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the company, the conductor has entire control and management of the train to which he is assigned. * * * In no proper sense of the term is he a fellow-servant with the fireman, the brakeman, the porters, and the engineer.

Brakemen are
fellow-ser-
vants.

The latter are fellow-servants in the running of the train under his direction." Patterson, in his work on *Railway Accident Law* (page 350, § 320), says: "Railway servants also impliedly assume the risk of injury from negligence on the part of their fellow-servants. This rule was not enunciated in *Priestley v. Fowler*, 3 Mees. & W. 1, but it is the necessary result of the decision in that case which rests the liability of the master upon his personal negligence, for a master cannot be said to be personally negligent if an injury is caused to a servant by the negligence of a fellow-servant, in whose original selection and subsequent retention in his post the master has exercised due care." G. W. Manear and the plaintiff were both brakemen occupying the same grade of employment. Manear did not act in a superior capacity to the plaintiff, and they must be regarded as fellow-servants. See *Madden v. Railway Co.*, 28 W. Va. 618. See, also, *Daniel's Adm'r v. Railway Co.*, 36 W. Va. 411, where HOLT, J., delivering the opinion of the court, says: "He who engages in the employment of another for the performance of specified duties and services for com-

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pensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, including the perils arising from the carelessness and negligence of those who are in the same employment as fellow-servants." See McKinney, Fellow Serv., p. 18, § 9; also page 267, § 124, where the law on this question is thus stated: "If one brakeman is injured through the negligence of another brakeman in the performance of his ordinary avocations, the current of authority is unbroken to the effect that they are fellow-servants, and the company is not liable." See Beuhrings' Adm'r v. Railway Co., 37 W. Va. 502. There is nothing in the record which imputes negligence to the conductor. The plaintiff, by his careless conduct, plainly contributed to his own injury. For these reasons the demurrer to the evidence should have been sustained, and judgment thereon given for the defendant, and the circuit court erred in not so holding. The judgment complained of is reversed, and judgment is rendered for the defendant on the demurrer to the evidence, with costs, etc.

Brakeman assumes ordinary risks of service.

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v.

TOWN OF RAVENSWOOD.

(*Supreme Court of Appeals of West Virginia, March 25, 1896.*)

Change of Route as Affecting Municipal Aid Bonds.—If, at the time a proposition to subscribe to the stock of a proposed railroad is submitted to the voters of a small municipal corporation, the route of such road is located through the corporate limits of such municipality, in the absence of proof to the contrary such location will be presumed to be a part of such proposition; and if, after the vote is taken, such location is materially changed to a route entirely beyond the limits of such municipality, the right to demand the issuance of the bonds authorized by such vote will be presumed to have been abandoned even though the authorities of such road should, by leave, obtain the privilege of running trains over the track of another road in full operation, and extending through such municipality on a different route and in a different direction.

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ERROR to Jackson county circuit court. *Affirmed.*

V. B. Archer, for plaintiff in error.

R. F. Fleming, N. C. Prickitt, and W. A. Parsons, for defendant in error.

DENT, J.—On the petition of the Ravenswood, Spencer & Glenville Railway Company, the circuit court of Jackson county issued a mandamus *nisi* against the town of Ravenswood *et al.*, requiring them to appear and show cause, if any, why the authorities of said town should not be required to issue \$3,000 bonds of said town in payment of subscription to the capital stock of the petitioner, authorized by the voters of said town at an election held therein for that purpose on the second Tuesday in July, 1889. The defendant appeared, and demurred to the said petition and writ. The demurrer having been overruled as a return thereto, they filed their separate answers. To these the plaintiff demurred, but the court overruled the demurrer; and, the plaintiff not pleading or replying to the answers, the court heard the case on the papers filed, orders had, and oral testimony, and entered a final order refusing the relief prayed, quashing the writ, and dismissing the petition. From this order a writ of error and supersedeas was awarded, and the plaintiff now here insists that the circuit court, in refusing the relief prayed, erred.

The answer of the town, by its officers, with great prolixity and at length denies everything set out in the alternative writ and petition, but from its numerous allegations the following is gleaned to be the real reason why the bonds were not issued, to wit: That the vote was taken and the bonds were authorized to be issued by the voters of the town of Ravenswood, a small town situated on the Ohio river and Ohio River Railroad, containing about 900 inhabitants, with the understanding that the plaintiff's road would be built as then located through the corporate limits of said town, and that, after the vote was taken, the location was changed so as to throw the line without and several hundred feet to the south of the corporate limits. To such allegation the plaintiff makes no reply or plea, but, in its evidence taken at the hearing, admits the change of location, but seeks to avoid its effect by showing that, from the point where its road intersected with that of the Ohio River Railroad Company, it made traffic arrangements with the latter company for the period of 10 years by which

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it was to use the latter company's tracks to reach and enter the corporation of Ravenswood, and also use its depots and terminal facilities therein, and insists that this is substantial compliance with all necessary conditions existing at the time the vote was taken. There are numerous questions raised, but this presents the real gist of this litigation, the determination of which must settle this controversy. In the case of *Banet v. Railroad Co.*, 13 Ill. 504, it is held: "A subscriber to railroad stock will be held liable to the payment of his subscription although the legislature may have authorized, and the directors of the company may have adopted, a change of route from the first fixed by law, provided the change does not make an improvement of a different character, and his interest is not materially affected by the alteration." And in the case of *Sprague v. Railroad Co.*, 19 Ill. 177, in approval of the foregoing decision, it is said: "In determining the question as to how far the original purposes of a corporation may be departed from after subscriptions have been made to its stock without violating the rights of the stockholders individually, we must first consider with what intention and in view of what advantage the law must presume such subscriptions are made. As is clearly manifest from the decision of the case above referred to, the conclusive presumption is that it was with a view to the profits to be derived from the stocks thus subscribed as an investment, and not in reference to any incidental advantages which may accrue to the stockholders by reason of the construction of the improvement, in consequence of any anticipated enhancement of any other property which the stockholders may own, or otherwise." *Railroad Co. v. Zimmer*, 20 Ill. 654; *Railroad Co. v. Earp*, 21 Ill. 291; *People v. Holden*, 82 Ill. 93. These cases (and many others in support thereof might be cited) establish the rule that a subscriber to railroad stock is induced to grant his subscription thereto from the profits and dividends to be derived from the stock, and not from any supposed incidental advantage he may derive from the construction of the road on a peculiar location; and therefore he cannot escape the payment of his subscription because of a change in the location of the road detrimental to his private property. This rule does not apply, however, to the subscriptions of municipal corporations under the laws of this state. They are not permitted to become subscribers to the stock of a railroad without regard to its location, but they

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are limited to such railroads as are located through, by, or near such corporations, being such railroads as will promote the general prosperity and welfare of the taxpayers of such corporations. It is a well-known fact that subscriptions of stock are no longer made by municipalities to railroad companies through prospect of profit to be derived from the investment, for, while in name they are subscriptions to the stock, they are nothing more than gifts, but that they are made to secure the indirect advantages to be derived from the construction of such railroad by the citizens of such municipality in the enhancement of their property, the increase of the population and taxable subjects and property, and the opportunities for labor and employment furnished. The actual location of the line of the road before the vote for a proposed subscription is had becomes an essential and important factor in securing the assent of the voters, and a material change of such location after such assent is secured is a breach of the condition on which said vote was had, sufficient to vitiate and render it invalid. In the case of *Town of Platteville v. Galena & S. W. R. Co.*, 43 Wis. 493, it was held: "It is competent for a railroad company in submitting to a municipality a proposition for aid to define therein, as a part of the proposition, the line of the proposed road." And, if it does so, it is bound thereby. Such a proposition may be orally submitted, as well as in writing. And where the road has been already located through a town, and a proposition for aid is submitted to the authorities thereof, it must necessarily be presumed that such location was a part of the proposition. The time, terms, and conditions of the issuance of municipal aid bonds depend entirely on the consent of the legal voters. *Hodgman v. Railway Co.*, 20 Minn. 48 (Gil. 36). Such conditions cannot be departed from or changed without the consent of such voters, ascertained in the manner provided by law. *State v. County Ct. of Daviess Co.*, 64 Mo. 30; *Chapman v. Railroad Co.*, 6 Ohio St. 119; *Noesen v. Town of Port Washington*, 37 Wis. 168, 177.

In the case under consideration, at the time the vote on the subscription was taken, the railroad had been located through the corporation, and within its limits, to the Ohio River Railroad Depot; and it was fully understood by the

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voters that such was to be its route, as none other had been suggested. This would have been of great benefit to all those along and through whose property it passed, making such property accessible to and useful for warehouses, freight depots, coal and cattle yards, etc., and enhancing the value of the property of the town generally as being near the permanent depots and terminus of such railroad, including its junction with the Ohio River Railroad. Ravenswood is a small country town, containing about 900 inhabitants, and including, within its corporate limits about 80 acres. After the vote was taken, and resulted favorably, the location was changed so as to be entirely without the corporate limits, and several hundred feet south thereof, and to an intersection with the Ohio River road at a point inaccessible to the town, except over the latter road, over which the plaintiff runs its trains into the town, by virtue of a ten years' lease, aforementioned. This may be in good faith, and it may not be. Plaintiff claims that it should be received as a full satisfaction to the town for its abandonment of its former route. Now, it is easy enough for the plaintiff, in conjunction with the Ohio River road, to relocate their depots at the junction of the two roads, and thus enhance the value of the real estate in the vicinity of such junction, and correspondingly depreciate the value of the property within the corporate limits of the town, and thus not only defeat the purposes for which said bonds were authorized, but greatly interfere with the prosperity of the town. It is true, the corporate limits could be extended so as to embrace the new location and terminus of the road, but this would not secure to the present residents of the town the benefits they expected to derive from the construction of the road as located when they authorized the issuance of the bonds. If there had been no location of the road at the time the vote was taken, and the proposition had been to build such road from or even through the town of Ravenswood to the other terminus thereof, then the building the road to the Ohio River road to a point so near the corporate limits, and entering the town over the latter road, might well be deemed ample compliance with the subscription proposition of the town, provided the assent of the voters could have been obtained to a proposition of so general a nature. But the change of the settled location of the road, as understood by

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the voters at the time they gave their assent to the issuance of the bonds, whether for the benefit of the plaintiff or others, is undoubtedly a breach of the condition of their authorization, and an abandonment of the plaintiff's right to demand them. The judgment is therefore affirmed.

GREEN

v.

COAST LINE R. CO. *et al.**(Supreme Court of Georgia, Oct. 5, 1895.)*

Priority between Railroad Mortgage and Judgment for a Tort Committed after the Execution of the Mortgage.—By invoking equitable relief, such as the appointment of a receiver and the administration of the mortgaged property by equitable means and agencies, mortgagees submit themselves to do equity relatively to any creditor of the mortgagor who may rightly intervene in the foreclosure proceedings in which such relief is sought. Mortgages upon a railway, and the income from the same, the mortgagor being left in possession, are, as to the income, whether produced before or after the appointment of a receiver in foreclosure proceedings, subject to be postponed in equity in favor of a claim for damages resulting from a tort committed by the mortgagor while and by reason of operating the railway after the execution of the mortgage. The tort now in question consisting of negligence in running a train upon the railway, whereby damages accrued, and judgment therefor against the mortgagor having been obtained before the mortgages were foreclosed or the receiver was appointed, such damages, so reduced to judgment, should be regarded as operating expenses charged by the judgment upon income as against the mortgages and all their incidents. So long as such a charge is unsatisfied, the mortgagees cannot justly and equitably divert income from its payment, and take the benefit of such diversion, whether directly or indirectly.

Same.—In the present case, when the court adjudicated finally upon exceptions to the master's report, it was, according to recitals in the bill of exceptions, matter of authentic fact, of which the court should have taken judicial notice, that, counting income expended by the receiver for new steel rails, iron, and cross-ties, and the sums applied by the court to fees of the receiver and his counsel, about double as much income as would be required to satisfy the judgment for damages had been thus used up while the case was in progress. It is manifest that the mortgagees cannot take all the fruits of the case without incidentally profiting by this income, to the detriment of the judgment creditor. For this reason, if for no other, the court erred in approving and sustaining the master's report in so far as it ranked the judgment below the mortgages as a claim upon the fund in court for distribution, that being

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all the fund there was for distribution ; the mortgages being more than sufficient to exhaust it, and the common debtor being insolvent. The court, under the special circumstances, should have ranked the judgment as superior to the mortgages. Let this be done by properly modifying the decree.

Evidence Taken by a Master is Part of the Record.—The evidence taken by a master, and duly reported by him to the court appointing him, is a part of the record in that court of the case to which it appertains, and, when specified in the bill of exceptions as material, is properly brought to the supreme court in the certified transcript. This being so, the motion to dismiss the writ of error is denied.

ERROR from Chatham county superior court. *Reversed*, with directions.

R. R. Richards, Wm. R. Leaken, and Charlton, Mackall & Anderson, for plaintiff in error.

Geo. A. Mercer & Son and Saussy & Saussy, for defendants in error.

SIMMONS, C.J.—At my request, concurred in by my associates, Ex-Chief Justice BLECKLEY has assisted the court both in deciding this case and in preparing the opinion. After adoption by the full court, it now appears in his language. The same is true of the head-notes.

The Coast Line Railroad Company executed to trustees two mortgages in the form of trust deeds, the first dated September 1, 1874, and the second May 1, 1876. The former was made to secure the payment of bonds amounting to \$25,000, maturing September 1, 1894, issued by the company to raise a fund for use in the construction of a portion of its railway; the latter to secure bonds of the company amounting to \$32,000, maturing May 1, 1886, issued to liquidate the floating debt of the company. Both mortgages covered the franchises, present and prospective, and all the property, real and personal, of the company, both acquired and to be acquired, including expressly all "tolls, income, rents, issues, and profits," accruing after any default made in the payment of the bonds themselves, or of any interest due thereon. All the bonds bore interest from date, payable semiannually. The Coast Line Railroad Company had its origin as a corporation under the name of the Wilmington Railroad Company. Acts 1868, p. 114. For change of name, see Acts 1872, p. 375. "Power to borrow not exceeding \$25,000, current and lawful money, and issue bonds for the payment of the same,"

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was conferred upon a majority of the directors by an amendment to the charter. Acts 1874, p. 312. The first mortgage was made to secure these bonds, and there was no statutory authority for making it except the general provision relating to mortgages, contained in section 1954 of the Code, which reads as follows: "A mortgage in this state is only a security for a debt, and passes no title. It may embrace all property in possession, or to which the mortgagor has the right of possession at the time, or may cover a stock of goods, or other things in bulk, but changing in specifics, in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches on the purchases made to supply their place." Before the second mortgage was executed, power was conferred upon the company to issue bonds, not to exceed the sum of \$250,000, "secured by mortgage upon the whole or any portion of the property of the company." Acts 1876, p. 258. Though the act of February 29, 1876 (Acts 1876, p. 118), which now forms sections 1689v to 1689y of the Code, was in existence when the second mortgage was executed, it has no application to that mortgage, for the reason that this act relates only to railroad corporations formed by the purchasers of railroads in the mode pointed out by the provisions of the act. The company made default as to the principal, as well as interest, on the second mortgage bonds in 1886, and as to the interest on the first mortgage bonds in March, 1890, and has continued thus in default ever since. On the 30th of April, 1890, a train, when running upon the railway of the company by steam power, ran against or over the husband and also a son of Mrs. Green, killing them both; and on July 17, 1890, she recovered against the company, in the city court of Savannah, \$1,750 as her damages for this tort. The Messrs Green, at the time of the homicide, were not employes of the company, or, so far as appears, under any contract relation to it or with it, but were simply members of the general public, passing on foot along a sidewalk adjacent to the railway track. According to express provision of the mortgage deeds, the trustees could, when the default of the company in paying principal or interest due on any of the bonds had continued for 60 days, have entered into possession, and operated the railway, or could have instituted legal or equitable proceedings to foreclose; but neither of these steps was taken until after judg-

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ment in favor of Mrs. Green was rendered, nor until October 25, 1890, when a petition by the only trustee then in office and by one of the bondholders (the latter owning all the second mortgage bonds, and most of the others) was filed in Chatham superior court to foreclose the mortgages, and for the appointment of a receiver. This bondholder (co-plaintiff) was president of the railroad company at the time of bringing this suit, and had been so continuously since the year 1883 or 1884. A receiver was appointed on November 7th thereafter, and the company turned over to him all of its property, including \$225.04 in cash. Among the expenditures of the receiver, reported by him August 6, 1892, was an item of \$2,349.88, for steel rails, iron, and cross-ties, which he had purchased and used in improving the property; and the net earnings for distribution reported by him amounted to \$2,327.22. The corpus of the property, when sold on July 5, 1892, produced \$75,000, none of which was expended by the receiver. Pending the cause in Chatham superior court, Mrs. Green filed her intervention, claiming payment out of the fund under the control of the court. There was a reference to a master in August, 1891, and the master reported in April, 1893, and again by supplemental report in March, 1894. The master disallowed Mrs. Green's claim as one having priority over the mortgages, ranking it as inferior to them, both as to corpus and income; and she filed exceptions to his reports, which exceptions the court overruled on July 9, 1894, and approved both reports of the master. The verdict of a jury was rendered on August 3, 1894, in conformity with the master's report; and on the next day exceptions *pendente lite* were filed by Mrs. Green, complaining of error committed by the court in overruling her exceptions and in approving the reports. Afterwards, on the same day, the court decreed finally in favor of the priority of the mortgages; and by bill of exceptions certified September 1, 1894, Mrs. Green brought the case to this court, assigning error on the decree and on the matters embraced in her exceptions *pendente lite*. Pending the case before the master, and on the same day of the receiver's last report, to wit, August 6, 1892, the court ordered the receiver's counsel to be paid \$1,000 out of income, and on December 17, 1892, ordered the receiver himself to be paid a like sum out of the income.

Assuming both mortgages to be good and valid, and con-

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ceding their priority over Mrs. Green's judgment as to the corpus of the property mortgaged, two general questions arise for our determination, which are: First. Had they a like priority in respect to the income? And, secondly, if they had not, but the priority as to it was with the judgment, whether the application of a portion of the income to betterments, made by the receiver while he was in charge of the railroad, and operating it, and of another portion, made by the court, to the payment of the receiver's counsel, and to the receiver himself, while the case was pending before the master in chancery, would defeat Mrs. Green's claim altogether, in so far as the fund derived from income has thus been exhausted, or whether that fund, so far as may be necessary to pay her judgment, should be reimbursed out of the fund produced by the sale of the corpus, and which was still under the control of the court at the time the final decree was rendered. Upon both principle and authority, the second question is, under the special facts of this case, so clear that it may be left to stand on the head-notes. The first question alone needs discussion in this opinion.

The first mortgage was 14 and the second 12 years old when the corporation, while in possession and operating the railroad, committed the negligent tort for which Mrs. Green recovered her judgment. At that time some of the interest on the first mortgage bonds was overdue and unpaid, and all the principal and some of the interest of the second mortgage bonds had been due and unpaid upward of 3 years. So far as appears, the corporation had no contract relation whatever with Mrs. Green or any of her family. Her judgment against the corporation for her damages was rendered 2 months and 17 days after the cause of action arose. The petition in the foreclosure proceeding was filed 5 months and 25 days after the double homicide was committed, and 3 months and 8 days after judgment for the damages was rendered in the city court. Thirteen days later a receiver was appointed. It was not alleged that any demand upon the corporation had been made for possession of the mortgaged property, nor did the petitioners invoke the aid of the court to put them, or either of them, into possession, so as to enable them to operate the railway and receive the income under the power contained in the mortgage deeds. The fair presumption is that the money turned over to the receiver by the corporation was a

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remnant of income earned and collected by the corporation, nothing to the contrary appearing. The receiver's operations resulted in a net income over operating expenses, large enough (when swelled by what he expended for steel rails, iron, and cross-ties used by him to improve the railway before it was sold out) to discharge the judgment and leave about 50 per cent of the income fund to be applied to the expenses of the receivership other than current operating expenses. The corpus of the mortgaged property sold for \$75,000, considerably more than the principal of the bonds; but not enough, even with the income fund added, to pay off the bonds, interest as well as principal. No doubt exists that the company is insolvent, and nothing in sight indicates that Mrs. Green will or ever can realize one cent for her damages, unless she gets it by being allowed priority over the mortgages as to the income made by the receiver, and the remnant of cash turned over to him with the railway, etc., when he entered into possession as receiver.

Each of these contestants had notice of how the corporation stood in relation to the other. The charter was the medium of notice to the mortgagee. The mortgages, together with the due recording of them, were notice to Mrs. Green. But of what avail was notice to her? The purpose of notice is to warn the notified not to deal or trust save in subordination to the right to which the notice relates. Mortgagee, lender of money, or purchaser of bonds could profit by notice, but notice of a mortgage is wholly without efficacy in guarding one against suffering damage by a pure tort at the hands of the mortgagor. The observation of Mr. Justice BREWER in *Kneeland v. Trust Co.*, 136 U. S. 97, 98, 43 Am. & Eng. R. Cas. 519, repeated by Mr. Justice SHIRAS in *Thomas v. Car Co.*, 149 U. S. 95, has no application to Mrs. Green; that observation being as follows: "No one is bound to sell to a railroad company, or to work for it; and whoever has dealings with a company when property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of mortgage liens." Unless a mortgage upon property be also upon the income, a mortgagee out of possession has no claim or lien upon income. *Teal v. Walker*, 111 U. S. 242. This is true in Georgia, although the income accrue from the property while in the hands of a receiver. *Vason v. Ball*, 56

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Ga. 268. Where income as well as corpus is embraced in the mortgage, the mortgagee excludes himself from all the income which accrues while he voluntarily remains out of possession. A right of possession which he declines to exercise is of no avail. *Railroad Co. v. Cowdrey*, 11 Wall 459; *Gilman v. Telegraph Co.*, 91 U. S. 603; *Bridge Co. v. Heidelbach*, 94 U. S. 798. Where the mortgagee has, by the terms of the mortgage, a right to take possession after default of payment, make income, and appropriate the same to his debt, and he elects not to do so, but to apply for a receiver by an equitable petition to foreclose the mortgage, and bring the property to sale, and, pending the suit, to make income through the receiver, he has not the same strict right to the income made by the receiver that he would have to income made by himself, as mortgagee in possession. Custody by a receiver is possession by the court, and is exclusive alike of both parties to the suit. Undoubtedly, a court of equity may treat income made by itself through a receiver as legally its own, held in trust for the beneficiary best entitled to it. The mortgagee is still out of possession; and where he has neither demanded it, nor applied to a court for aid in obtaining it, he is out by his own voluntary election. The court may, and, where it finally decrees in his favor on the merits, generally will, consider its own possession as substituted for the one to which he was entitled, and as attended with the same incidents touching net income; but the court is not absolutely bound to dispose of this income just as the mortgagee would have a right to apply it had it accrued from the mortgaged property while in his possession and under his own management. On the contrary, the court may consider and give effect to equities concerning it which the mortgagee might safely ignore or defy were he not a voluntary suitor for equitable relief. The corpus of the mortgaged property, whether realty or personalty, is no less the property of the mortgagor after it is put into the hands of a receiver than it was before; and in Georgia it remains his property until actually sold. Not even foreclosure and decree of sale will terminate or divest his title. In practice, we have nothing corresponding to a strict foreclosure in England. The net income made by the receiver, though embraced in the mortgage, is also the property of the mortgagor, so long as it remains subject to control and application by the court, the mortgagee having absolute title to

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neither, but a lien upon both; but, this income not having been in existence when the mortgage was executed, his lien, as to it, is not a legal lien pure and simple, but one which gets its ultimate efficiency from equity, through the doctrine either of equitable assignment or equitable estoppel. Jones, Chat. Mortg., §§ 170-175; 1 Jones, Mortg. ? (5th Ed.), § 149 *et seq.*; 1 Ping. Chat. Mortg., § 453 *et seq.* Mortgage of income covers net income only. Jones, Corp. Bonds & Mortg., §§ 80-90; 1 Ping. Chat. Mortg., § 461; 1 Jones, Mortg., § 160; Fosdick v. Schall, 99 U. S. 252.

In equity, however, it might be at law, it makes no substantial difference that these mortgages are trust deeds in form, and convey absolutely. They ought, in this forum, and on such a question of priority as that now before us, to be considered as mortgages, pure and simple. So considered, they pass no title, but are only securities for debts. Code, § 1954. With the trust deeds reduced in equity to the rank of mortgages, this is not a case in which one competing creditor has a legal lien, and the other has none; for in Georgia a judgment lien attaches upon property previously mortgaged, as well as upon any not so incumbered. "All judgments obtained in the superior, justices', or other courts of this state, shall be of equal dignity, and shall bind all the property of the defendant, both real and personal, from the date of such judgment, except as otherwise provided in this Code." Code, § 3580. "A future interest in personalty cannot be seized and sold, but the lien of judgments will attach thereto, so far as to prevent alienation before the right to present possession accrues." *Id.*, § 2625. A judgment against a railroad corporation binds all its property, including its franchises, except only its franchise to be a corporation. *City of Atlanta v. Grant*, 57 Ga. 340. The lien of Mrs. Green's judgment covers net income made by the receiver as fully as does that of the mortgages; and, being statutory, it needs no aid from equity or equitable principles to render it a complete legal lien on income. Ought equity to afford aid to postpone or defeat it, under the facts of the present case? Without reducing the trust deeds to the rank of mortgages, how would the matter stand? In that case the mortgagee would take the legal title of the whole railroad property, the franchises included, and, relatively to the public, would stand as owner, for the time being, and, since franchise and duty are inseparable,

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arable, would be liable directly and primarily for the damages occasioned by the tort. To treat the deeds as mortgages is thus a favor, rather than a disadvantage, to the mortgagee and the bondholders he represents. If it be said that, as railroad property is peculiar, a mortgage upon it should, if the terms of the mortgage be sufficiently comprehensive, be construed to bind both future acquired corpus and future accrued income, at law, then we answer that, because of this very peculiarity, the income so bound should, in a court of equity, be limited strictly to the surplus, after satisfying all damages to the public occasioned by using the franchises, whether such use was by the mortgagor or the receiver. If it be said that by filing the petition to foreclose, or by actual seizure of the property through a receiver, a lien upon income arose, or the mortgage lien was aided, then the reply is that this was after the judgment lien of Mrs. Green attached on corpus, and was ready to attach on income as it accrued; and so the equity of the judgment is as much aided by its legal lien as the equity of the mortgage is aided by filing the petition, or by actual seizure.

These joint plaintiffs, after describing Mrs. Green's judgment and other judgments, inserted an appeal to the heart of equity, as follows: "And your petitioners show that as yet no active measures have been taken by the holders of said judgments to enforce the same, but that they have threatened, and still threaten, to levy the same upon the property of said defendant corporation, and to sell out said railroad and its franchises; and petitioners show that any such levy and procedure must result in serious sacrifice, not only to said road, but to the holders of its lien securities, and that no proper adjustment and settlement of said various demands can be made except through the action of this court, by the enforcement of remedies of an equitable nature. Your petitioners, by this proceeding, afford and offer to said judgment creditors, and to all other parties having legal demands against said defendant, full opportunity to intervene and to assert their claims; but petitioners pray that in the event that either of said judgment creditors, or any other creditor, shall make any levy upon the property of said defendant, or otherwise proceed against the same, the court will at once, and from time to time as may be required, issue its writ of injunction against said party or parties restraining all further proceedings by

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separate suits, and compelling said parties to intervene and assert their rights in this suit. Your petitioners show that they are remediless under the strict rules of the common law, and can obtain adequate and sufficient relief only through equitable principles and methods to be administered by this court." Who are those who made this appeal to equity, and invoked the remedy and rules of equitable relief? The surviving mortgagee and one of his wards under the trust of the mortgages. This ward, by virtue of owning all the bonds of the second issue and most of those of the first issue, joined in the petition as co-plaintiff, being, moreover, president of the railroad corporation at the time of filing the petition, and having been so when Mrs. Green was made a widow mother, and when she obtained her judgment, and for many years before, even when the first default of the corporation occurred. As equity applies estoppel in aid of mortgages on future acquisitions, whether of corpus or income, it certainly might apply a like doctrine in aid of a judgment recovered by a wife and mother for homicidal negligence by a railway corporation, which happened when one of the plaintiffs, and the chief beneficiary of the suit, was president of the derelict institution. Would it be harsh to say to him, in answer to his appeal: "Sir, if you had desired your bonds and coupons to have a sweeping and unlimited preference over a judgment for damages occasioned by negligent homicide, you ought to have seen to it that the injury causing the damages was not inflicted. You were in control, whereas this wife and mother had no control, and nothing to do with the management. It would be far better to impute the negligence of the corporation to you, its president, than it would be to turn her away empty, that your coffers may be made a little more full." We do not propose, however, to rest the case on a ground so narrow, or on any which does not apply alike to all the bondholders.

It is of much importance to the wider and true ground that the income in question was made by exercising the franchises granted by the state to the railroad company, a corporation of a *quasi* public nature. Such corporations incur certain duties and obligations to the public, which adhere firmly to the franchises granted, and cannot be separated from them without legislative consent. Railroad Co. v. Mayes, 49 Ga. 355, and cases cited; Railroad Co. v. Liddell, 85 Ga. 482; Railroad

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Co. v. Phinazee, 93 Ga. 488. These duties and obligations, equally with the franchises themselves, are matters of fundamental contract between the corporation and the sovereignty creating it,—a contract which is paramount to all subsequent contracts which the corporation is capable of entering into, with any person or for any purpose. By necessary implication, these latter contracts are always qualified and held in check by the former, and in every conflict they must be subordinated to it. The corporation can grant to others no immunity as to its franchises which it could not claim for itself; nor can it in behalf of its creditors, or any of them, free the franchises from being answerable out of the revenue produced by their exercise, for torts committed in the use of them, whether such torts be committed by the corporation itself or by others using the franchises with its consent or by its permission. It is by reason of this firm adhesion of duty imposed to franchise granted that an incorporated railroad company cannot lease its line of railway, and permit it to be operated by the lessee, without being liable for negligent torts committed by the lessee, to the same extent as if they were committed by itself. See authorities cited in 2 Cook, Stock & S. (3d Ed.), § 906; 3 Wood, Ry. Law (Minor's Ed., 1893), §§ 489, 490. And this rigid rule of liability, which is directly the opposite of that which prevails touching leases where no charter franchises of a *quasi* public nature are involved, is not relaxed in favor of a company having express permission from the legislature to make the lease, unless there be also an express exemption or grant of absolution from liability. Singleton v. Railroad Co., 70 Ga. 464. Thus, in the case of a mere permissive lease of a railroad, there is cumulative rather than diminished security to the injured citizen, who, for a tort committed upon or against him by the lessee, in the exercise of franchises derived from the lessor, can hold either or both answerable for the damages. The essential reason on which the adjudged cases respecting the lease of railroads is founded is broad enough to extend and apply to mortgages, at least in so far as mortgages are designed to incumber future income. After a railroad company has mortgaged all its line, constructed and to be constructed, all its motive power and rolling stock, all its stations and depots, all its franchises, acquired and to be acquired, and all its future income save that which may accrue before

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it default on any of the mortgage debt, what besides this excepted income, supposing the mortgage to be valid and enforced as written, is left from which to make satisfaction for torts committed by the company during the indefinite time which it may be the interest or the pleasure of the mortgagee to stay out of possession, and leave the company in? By chance, there may be a surplus left from the proceeds of the corpus, or from income, or from both, after the discharge of the mortgage; but, by an equal chance, there may be none; and, by still another chance, a large deficiency may be the outcome. It is, and has long been, matter of common knowledge and general information which of these chances is most likely, in any given instance, to be converted into certainty, become realized as a fact of experience, and take its place in history. It would seem reasonable that relatively to negligent torts, by whomsoever committed, in the use of the charter franchises, the mortgagee of a railroad should, under the rule of public policy applicable to this kind of property, and constantly applied to it in respect to leases, be regarded either as owner, or as holding his incumbrance in subjection to the duties and obligations resting upon the owner, and so interwoven with the franchises as to be inseparable from them otherwise than by express statute. Regarding him in either light, he could not equitably appropriate to his mortgage debt income earned by the mortgagor or by a receiver, and leave a sufferer from such a tort uncompensated and without redress. If treated as owner, he would himself be liable, in the first instance, for the damages occasioned by the tort; and, if treated as holding his mortgage lien in subjection to the charter burdens imposed on the mortgagor, the least that he could justly do would be to stand aside as to so much of the income as might be necessary to right the wrong done by the tort. Can these charter burdens, or any of them, be evaded by creating the relation of debtor and creditor, with or without the relation of mortgagor and mortgagee super-added, any more than by creating the relation of lessor and lessee? Of what avail to the public would be the mere personal liability of a corporation with all its substantial assets bound hard and fast by mortgage, the mortgagor remaining in possession, and continuing to exercise all the corporate franchises? Can the whole of the corporate assets, including these franchises and the fruits of their exercise, be impounded

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by a mortgage contract or any other, and put in a bomb-proof, for 10, 20, 50, or 100 years, the term of credit, and for any period of indulgence or forbearance thereafter which the mortgagee may choose to grant ?

It is manifest that the distinction between general and special creditors, or between general liens and specific liens, is only nominally involved, or, if really involved, is favorable to the involuntary creditor, made so by tort, rather than to the voluntary creditor by mortgage, where these two creditors are the contestants over income, and where the mortgagor is a railroad corporation, and the mortgage covers all its effects, real and personal, present and future. The lien of such a mortgage, when aided by the doctrine of equitable assignment and estoppel as to corpus acquired and income produced after its execution, is as comprehensive, and therefore as general, as the lien of a judgment based on the tort is or could be. In such a case the liens are equally general, for the voluntary creditor did not extend credit or take security merely upon some particular property of his debtor, but upon all he had or might ever get. And what specializes the involuntary creditor, or tends to specialize him with pathetic emphasis, is that he did not extend credit at all, but was forced to become a creditor against his will, and without any security whatever, save that afforded him as one of the general public by the charter of the wrongdoer. One creditor who, by any contract whatever, secures himself on all his debtor's effects, all the present and all the future, without limit of time, has no claim to be considered as a special creditor, and is not entitled to any favor whatever in a court of equity beyond what the rules of inexorable law entitle him to demand, as against damages for a tort committed by the debtor to a stranger, whether pending the term of credit or after it expired. The reason why specific liens prevail over general legal liens is that there is something left, or possible to be left, for the latter, after the property covered by the former is all absorbed. A special lien is a lien upon particular property. If a lien extends to everything, acquired and to be acquired, it is not special merely because it was created by a mortgage or other express contract. Relatively to income, the judgment of Mrs. Green is far better entitled in equity to the status of a special lien or charge than are these mortgages. The plaintiff in that judgment is a creditor by compulsion, as was the damaged

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creditor in *Trust Co. v. Thurman*, 94 Ga. 735, where the damage resulted to a tract of land by reason of taking part of the tract for right of way. The strong equity on the side of the involuntary creditor is too obvious to escape the discernment of a child, and the question comes down to this: Whether the law as administered by courts of equity will, on the ground of public policy; in view of the paramount rank of charter duties involving public safety, give effect to this equity on income made by a receiver, when it is supported by a junior legal lien,—the lien of a general judgment for the assessed damages.

Duty is inherent in franchise, adheres to it, and, as we have seen, cannot be separated from it without express enactment. It would be far more rational to subject the corpus, especially the corpus of the franchises, than to exempt income. The present case, however, calls for nothing beyond subjection of the latter. It is like stopping the freight earned by the voyage, and sparing the ship. Benefits and burdens are correlatives, and he who would appropriate all a debtor has must adopt such of his burdens as are fundamental to his debtor's right to have existence, and create any debt or incur any obligation whatsoever. Burden equals benefit as a ground of equitable preference; and the loss by reason of the debtor's insolvency is to be borne by the creditor who would have been ultimately benefited if no loss had occurred, or if the loss occasioned by failure of the debtor in his duty had been a gain, instead of a loss. Like the electric current, preference or special priority of payment has, in reference to a "going concern" of a *quasi* public nature, two opposite poles. Any adjudication must be wrong which, overlooking this, treats it as having but one. The positive pole is benefit, public and private benefit to all, and benefit to the individual; one of the necessary individuals to be benefited being the holder of the incumbrance which would rank first were there no special priority to be considered. The negative pole is burden, burden like that of diligence imposed by public policy for public benefit, for the interest of all, but, in the nature of things, any disregard of it not benefiting, but tending to injure, the individual who would otherwise be and remain the favorite. Upon him it falls incidentally as a loss by misfortune, just as a failure in duty by others often affects us, and our failure in a like duty as often affects them. A doctrine

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of preference based exclusively on benefit would pay preferentially for feeding the winning horse, for riding him, and even for whipping and urging him on to the goal, for making him go, and keeping him a "going concern," but not for damage done to a person run over in the race in consequence of negligence by or attributable to the owner. Maritime law, which is more conversant with "going concerns" on a large scale than any other branch of law, because it has dealt with them longest, would discriminate, not against the claimant for damages, but in his favor. 14 Am. & Eng. Enc. Law, 443, 16 Am. & Eng. Enc. Law, 358; *Force v. The Pride of the Ocean*, 3 Fed. Rep. 162; *The John G. Stevens*, 40 Fed. Rep. 331. In building up and developing a system of liens applicable to supplies, repairs, advances, wages, pilotage, towage, wharfage, salvage, damages by tort, etc., it has put damages by tort at or near the head of the list; and the reason for doing so is one of public policy, the encouragement of safe navigation,—a reason no less applicable to railways extending along or across public thoroughfares than to ships or steamers on the ocean, seas, or rivers; collision by cars or trains of cars with persons or property on land being as probable and frequently as hurtful as like collisions by vessels on water. Peril to person and property has shaped public policy with reference to marine torts, and that element exerts, and ought to exert, a chief influence in shaping it with reference to torts by railroads. Equity, like other divisions of jurisprudence, takes notice of public policy, promotes it, and conforms to it. 1 Spence, Eq. Jur. 427 and note. Indeed, the great equity maxim, "Once a mortgage always a mortgage," is based upon it. *Id.*, 599-603.

If it be said that, in maritime law, torts by a ship are attended with a lien on the ship for the damages, and that, in equity, no lien arises out of torts by a railroad company, the answer is that, though this is true, torts by the latter, as against a mortgagee of the franchises, are attended by an equity in behalf of the injured party as strong as that on which the ranking of the maritime lien for damages is founded. No one can doubt that relative strength of equities has been a ruling consideration in fixing the priority of the various maritime liens, as compared one with another. In so far as limiting the recovery for maritime torts to the value of the ship has influenced that priority, a like limitation arising out

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of the actual facts of the situation exists as to the assets of a railroad corporation; not, indeed, a limitation upon the right of recovery for torts committed by such a corporation, but upon the possibility of realizing the recovery, where not only the franchises and income of the railroad are mortgaged, but all other effects of the corporation, and where the corporation, after making the mortgage and committing the tort, proves insolvent. Whenever an equity is treated as a lien, it is so treated for the purpose of rendering it effectual to take and hold money, not merely to base an action upon; and any equitable right of payment which courts of equity will enforce as against some previous incumbrance competing with it for payment out of the given fund is virtually an equitable lien, whether called a "lien" or a "preferential claim." A maritime lien for damages is a legal, not an equitable, lien, though, doubtless, it got its rank, if not its existence, from the strong inherent equity of holding a ship answerable for injuries done by its instrumentality, no matter who was on board, or to whom it belonged, or who had mortgages or other liens, maritime or nonmaritime, upon it, and no matter whether the wrong was done or the seizure for it was made on the high seas or in a home port or a foreign port. Indeed, though the lien owed its origin to public policy, this very equity underlay that policy, and thus was the ultimate ground of the lien, both with reference to its existence and its rank. "The feather that adorns the royal bird supports him in his flight. Strip him of his plumes, and you fix him to the earth." This language was applied to the highest corporate being in a monarchy,—the king. But the bird may well stand for a subordinate corporation, especially when it exists only to move persons and property from place to place, as does a railroad corporation, and whose wings consist of chartered franchises, as real instruments of locomotion (though immaterial) as the pinions of a bird or the sails of a ship. No chartered railroad could be "a going concern" save for its franchises; and, by the use of these, to hurl locomotives, cars, or trains against persons or property, to their injury or destruction, is no less violative of public security and public policy than, by the use of sails or steam, to run one vessel against another on the high seas. The same policy which, irrespective of mortgages and other prior liens, holds the vessel to answer for the damages in the latter case, might well

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hold the railroad, more especially the franchises and their produce, to answer for the damages in the former case. "*Salus populi suprema lex*" is a cardinal maxim. It is the whole gospel of public policy condensed in a single text. The safety of the people is the supreme law; the good of the public first and before everything else. On the benefit side, the good of the public and the good of the mortgagee of a railroad coincide. Because of this, courts of high authority hold that supplies or services essential to keep a railroad in operation, and enable it to answer the ends of its creation, may become a charge upon income made by a receiver subsequently appointed. The consequence of so charging income may be made to affect the mortgagee irrespective of his consent. People may, by procurement of the mortgagor in possession, volunteer to benefit the mortgagee, and, if they succeed, may claim reimbursement or just compensation out of income. In the civil law there was something slightly analogous. A person who volunteered to act, and did act, without authority, in the affairs of another, during his absence, was called by that law "*negotiorum gestor*," meaning a manager of business. The duty of reimbursing, but not of rewarding, him, was enforced if his action proved beneficial to the absentee. Though an intermeddler, he was not forced to suffer in consequence of his useful officiousness, but was not allowed to profit by it. The principle is, at bottom, the principle of salvage. In maritime law, it has its literal and most striking application to services rendered in saving ships from threatened destruction. The right to volunteer assistance without being called on or employed to render it springs up out of urgency,—the urgency of the occasion. Peril and emergency serve as a letter of credit, and as a pledge of the endangered property as security for payment. Whoever is present at the scene of the threatened disaster may interfere, avert calamity, and save the ship. Toned down and shaded off for business attended with less hazard, this principle of salvage is also applicable when only moderate perils are involved,—perils which in no way threaten destruction, and some of them not to the ship itself at all, but only to the voyage or its speedy and successful accomplishment. Thus, for needful supplies furnished or repairs made, etc., maritime law renders the ship liable, and raises a lien upon it to secure the debt. So rational and comprehensive is the

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principle that we find it, in a modified form, prevailing to some extent in the common law, as is shown, for instance, in the frequent and familiar example of necessities furnished to a wife or child under certain conditions, without the consent, or even against the declared wish, of the husband or father. The law holds him liable to pay for them, provided they were proper in kind, quality, and quantity, and necessary to keep the woman or the infant "a going concern." We have a case in which the principle was applied in equity to a policy of insurance, where a stranger furnished money to pay installments of premium, when, if not paid, the policy would have lapsed and become lost to the beneficiary. *Hodge v. Ellis*, 76 Ga. 272. The stranger was allowed not only to be reimbursed his advances, but to share in the fruits of the salvage. In the case of *Raoul v. Newman*, 59 Ga. 410, Raoul was the station agent, at Macon, of the Central Railroad, and Newman was a physician. A negro boy, 13 or 14 years of age, was severely injured on the track in the yard of the company's warehouse. The father of the child was absent, and Raoul called in Newman as a physician. Services were rendered and charged to Raoul. This court held that if there was a great and overwhelming calamity to the child, rendering medical aid instantly necessary, the parent would be responsible as for necessities, and Raoul would be treated as his agent to call the physician.

The principle of benefit is salvage in a wide and comprehensive sense, and the principle of burden, on the other hand, is the inseparability of fundamental charter duties from charter franchises. The discharge of these duties is a burden laid upon railroad corporations by the law of their existence. Performance of them is attended with benefit both to the public and to mortgagees, and their violation tends to the injury of both. In so far as redress for violation can be made from the fruits of the franchises, the produce or income of their exercise, it is manifestly more just that this redress should go to a wronged and maltreated stranger than to a mortgagee, even though they be alike blameless. The mortgagee is in privity—a voluntary privity—with the corporation; the stranger is not. Every direct authority known to us is against us. Nevertheless, we are right, and these authorities are all wrong, as time and further judicial study of the subject will manifest. The mistake made by courts and judges has

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been that they treat the problem of preferential debts as having but one pole,—the affirmative pole of benefit,—ignoring the negative pole of burden altogether. It may be that several of the cases seemingly adverse to us were decided correctly on the facts involved in them, but the spirit and reasoning of all the cases are viciously narrow and unsound. There seems to be a theory that, if mortgaged railroads can be kept going concerns, it matters not what else may stop. That the public is decidedly the most important going concern in existence appears to be overlooked. As a part of the public, the husband and the son of Mrs. Green were going concerns, and the going of this railroad was the cause of their ceasing to be such. The cases on which we are animadverting would treat as a preferential debt a claim for the coal or wood consumed in generating the steam which killed them, but would deny any preference whatever to a judgment for damages resulting from the homicide. Public policy certainly favors keeping the franchises active, but it favors more the security of all who, as a part of the public, are liable to suffer by their activity. No policy is subserved by going wrong. Non-feasance is better than misfeasance; idleness is better than homicidal mischief resulting from a vicious or a negligent activity.

Two of the most important and best considered cases which lie in our path are *Hiles v. Case*, 14 Fed. Rep. 141, and *Trust Co. v. Riley*, 70 Fed. Rep. 32. In the first there were several interveners, who wanted damages for burning their timber and cranberry marsh. The fire resulted from sparks escaping from locomotives upward of four months before the receiver was appointed. In a brief, clear, and admirable opinion, except that it fights on the wrong side, if not of the case, certainly of the question discussed, Judge DYER, of the eastern district of Wisconsin, proceeds to fire the interveners from his court by a volley of judicial sparks, thus: "To sustain the claims in question, it is therefore necessary that some equity be found in favor of the petitioners, and superior to that of the bondholders, upon which to base their allowance. And the supposed equity is that the fire in question occurred after default on the part of the railroad company in payment of the mortgage debt or interest; that thereafter the company operated the road as the agent or trustee in equity of the bondholders, and that the alleged liability sought to be enforced

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in the present proceeding arose from such operations of the road, and as an incident thereto; that, therefore, it may be put under the head of operating expenses, and so acquire rank as a claim enforceable against the earnings of the road in the hands of the receiver. There is some plausibility in the argument, but it is unsound. No relation, of principal and agent, either in law or equity, can be implied from the mere fact that the railroad company continued to operate the road after it was in default in payment of the mortgage debt, nor from the further fact that the bondholders did not take possession of the property after such default, nor from both facts combined. The mortgages gave to the mortgagees the right to take possession after default, but they were not obliged to do so, nor was it necessary that they should take possession in order to avoid such a liability as is here claimed. The railroad company was operating the road when the alleged loss and damage occurred. The negligence of the company, if there was negligence at all, occasioned the loss. For that negligence it alone was responsible. To sustain the position taken by the petitioners, it must be held that the bondholders, at least impliedly, assumed liability for the negligence of the railroad company, and that, by operation of law, this mortgage security was subordinated to claims of the character of these. I cannot so hold. The alleged cause of action accrued after the company had given mortgages upon all its property, which were then subsisting liens, and before the receiver was appointed. It can make no difference that they accrued after the company was in default of payment of interest on its bonds. The road was still being operated by the company, and whatever liability existed must have been one against the company alone. In no just or proper sense could such claims as these be considered as part of the operating expenses upon which the petitioners could assert a right prior to that of the mortgagees. They are wholly unlike claims for supplies, new equipment, right of way, and new construction, or any claim falling legitimately under the head of operating expenses, which the court sometimes orders paid from net earnings in the hands of a receiver, as presenting equities superior to those of bondholders. If such claims as are here in question could be allowed, there would seem hardly to be a limit to the allowance of demands which it might be as forcibly argued were superior in their equities to

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those of the secured creditors, but which could not be allowed upon any sound principle of equity, nor without substantially impairing, and perhaps destroying, an otherwise valuable security."

The other case (*Trust Co. v. Riley*) was decided as late as September 30, 1895, only a few days before our judgment in the present case was announced. Its existence was unknown to us until after that time. A very able court decided it,—the circuit court of appeals for the eighth circuit; the members of the court presiding being Circuit Judges CALDWELL, SANBORN, and THAYER. The opinion was written by Judge SANBORN. The intervener rested his case on a judgment recovered for a personal injury, and the question considered was: "Is a claim for damages caused by the negligence of a street-railway company, a mortgagor, five months before a receiver was appointed in a suit to foreclose a mortgage upon its property and income, entitled to be preferred to the mortgage debt in payment out of the earnings of the railroad during the receivership?" The decision was in the negative; for the usual reason, namely, that the claimant had not benefited the mortgagee or the bondholders by suffering wrongful hurt to himself at the hands of the railway company. Seventeen cases decided by the supreme court of the United States, not one of them involving tort prior to the appointment of a receiver, are cited and reviewed in the opinion, after which it proceeds thus: "From this brief review of the decisions of the supreme court bearing upon this question, we think these propositions may be deduced: First. There are certain claims against a mortgaged railroad company, accruing before the appointment of a receiver, which are entitled to a preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership and out of the proceeds of the sale of this property. Second. It is an indispensable element of every such claim that it is founded upon property furnished or services rendered to the mortgagor, which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee. Third. Claims of this character have been given a preference over the mortgage debt by these decisions on one of two grounds,—either on the ground that the mortgage is a lien on the net, and not on the gross, income of the railway company, and

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where that part of the income that is applicable to the payment of current expenses of operation, proper equipment, and necessary improvements has been diverted to pay interest on the mortgage debt, or to otherwise benefit the security, and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the diverted fund by taking an equal amount from the earnings of the railway company during the receivership, and applying it to the payment of these claims in preference to the mortgage debt; * * * or on the ground that the payment of the claims is necessary to preserve the mortgaged railroad, and keep it a going concern. It is indispensable that the operation of a railroad be uninterrupted in order that the travel and traffic of the public may be accommodated, and in order that the franchises of the railroad company may be preserved from forfeiture. Hence the wages of employes, who might otherwise cease from their work, the amounts due to connecting lines of railroad, that might otherwise cease their business relations with the managers of the mortgaged property, and the claims for supplies and materials necessary to keep the mortgaged railroad a going concern, may, in proper cases, be paid out of the earnings during the receivership, or out of the proceeds of the sale of the mortgaged property, in preference to the mortgaged debt. * * * But a claim for damages for the negligence of the mortgagor lacks the indispensable element of a preferential claim. It is not based upon any consideration that inures to the benefit of the mortgage security. Wages, traffic balances, and supplies produce or increase income, and preserve the mortgaged property. Repairs and improvements increase the value of the security of the bondholders. But the negligence of the mortgagor neither produces an income nor enhances the value of the property. The wages, traffic balances, and claims for material and supplies accrue under and pursuant to the contract between the mortgagor and mortgagee that the former will properly operate the railroad. The damages for negligence accrue in violation of that contract, and for a breach of the duty of the mortgagor to operate the railroad carefully. Many preferential claims are for property or services that were necessary to make or keep the railroad a going concern, necessary to its operation. The negligence that is the foundation of this claim did not tend to keep the railroad in operation, but, if repeated and continued,

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would inevitably stop it. It was not necessary, but was deleterious to its operation. For these reasons, this claim for damages cannot, in our opinion, be allowed a preference over the mortgage debt in payment out of the income earned by the receivers."

Courts which thus reason and decide may possibly be reached by the late discovery of Prof. Roentgen, and, for their benefit and the benefit of the profession generally, we shall close this opinion with appropriate illustrations, based on the new process.* Judge SEYMOUR D. THOMPSON has produced a comprehensive, thorough, and truly great work on the Law of Private Corporations, one that no court or lawyer can afford to overlook or neglect, for it evinces a study of the subject in its breadth and in its details which is marvelous, and the results of which cannot fail to be highly useful, not only to us of to-day, but to coming generations. Perhaps such a vast body of law on any one subject has never before been collected together, and reduced to orderly arrangement and concise statement. The work is an immense magazine of learning, and yet of such practical bearing as to have no obtrusive air of erudition. Its only aim is to inform and aid the reader. This work (Commentaries on the Law of Corporations, vol. 5, § 7050), states the law of our question thus: "Claims for damages for torts committed by the corporation prior to the appointment of the receiver, whether reduced to judgment or not, are not to be preferred before existing liens in the distribution of the funds in the hands of the receiver, but such claimants stand on the footing of general creditors. An exception to this rule is that it is within the discretion of the court applied to for the appointment of a receiver to refuse the appointment, unless the petitioning bondholders will consent to an order that claims of this nature shall be preferred." In holding the true law of the question to be otherwise, no necessary conflict with any personal or independent opinion of Judge THOMPSON is involved; for it does not appear that he has formed any deliberate opinion of his own touching this special question, or attempted more with his own mind than to follow on the line of the precedents which a few courts have furnished, state the supposed law as they lay it down, and cite, if not all, some of the cases relied on. If, on reading

* Judge BLECKLEY'S engravings, though interesting, are unnecessary to a comprehension of the opinion, and are therefore omitted.

this present opinion even casually, he should differ with its conclusion, and this should become known to the writer, his own confidence in that conclusion would be startled, if not somewhat shaken, for on several branches of law Judge THOMPSON is authority; on corporation law he is very high authority.

Judgment reversed, with direction.

NOTE

As the learned judge who wrote the foregoing opinion admits, the authorities are pretty uniformly against the position there taken. See for instance *Davenport v. Alabama, etc.*, R. Co., 2 Woods (U. S.) 519; *In re Dexterville Mfg. & Boom Co. v. Case*, 4 Fed. Rep. 873; *Hiles v. Case*, 14 Fed. Rep. 141, 9 Biss. (U. S.) 549; *Central Trust Co. v. Wabash, etc.*, R. Co., 28 Fed. Rep. 871, 33 Fed. Rep. 238; *Olyphant v. St. Louis, etc.*, R. Co., 28 Fed. Rep. 729; *Hervey v. Illinois Midland R. Co.*, 28 Fed. Rep. 169; *Central Trust Co. v. East Tennessee, etc.*, R. Co., 30 Fed. Rep. 895, 30 Am. & Eng. R. Cas. 450; *Farmers' L. & T. Co. v. Vicksburg, etc.*, R. Co., 33 Fed. Rep. 778; *Easton v. Houston, etc.*, R. Co., 38 Fed. Rep. 12; *Addison v. Lewis*, 75 Va. 701, 9 Am. & Eng. R. Cas. 702.

But see *Gibbes v. Greenville, etc.*, R. Co., 15 S. Car. 518, 9 Am. & Eng. R. Cas. 723, where it was held that passengers over a railroad and employees of the company, when entitled to damages for injuries received while the railroad is operated by a receiver, should be paid out of the fund in court realized from the earnings of the road during the receivership, in preference to mortgage or other debts existing at the time of action brought.

See also 19 Am. & Eng. Ency. of Law 756, and notes in 9 Am. & Eng. R. Cas. 718 and 736.

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v.

BLUMENTHAL.

(160 Ill. 40.)

Party in Charge of Live Stock on Freight Train is a Passenger.—A person traveling with the consent of the railroad company upon a freight train, in charge of goods or live stock transported on the train, is a passenger, and the company is as liable for negligence resulting in injury to him, as if he were traveling on a train devoted to passenger service alone.

Presumption of Negligence.—In an action for personal injuries, proof that the plaintiff was a passenger, that the action happened, and that the injury was inflicted, is *prima facie* evidence of negligence, and imposes on the railroad company the burden of explaining the accident, and showing that it resulted from a cause for which the company should not be held responsible.

Negligence is a Question of Fact.—It is for the jury to determine whether the defendant has been guilty of negligence under all the evidence in the case, and an instruction which undertakes to tell the jury that certain specified facts constitute negligence, is improper.

Instructions.—An instruction which passes upon the sufficiency of the evidence instead of leaving that question to the jury, is improper.

Opposing a Motion to Strike Out Evidence is Waiver of Objection Thereto.—Where a party introducing evidence afterwards moves to strike it out, and the motion is denied, being opposed by the adverse party, the latter cannot on appeal complain of its original admission.

APPEAL from First district appellate court. *Affirmed.*

This is an action brought by the appellee against the appellant company to recover damages for a personal injury. Verdict and judgment in the trial court were in favor of the plaintiff, and the judgment has been affirmed by the appellate court, whence the case is brought here by appeal. The declaration charges that plaintiff is a cattleman by trade, and was engaged in the business of droving cattle from one station to another on January 10, 1891; that on said day he was a passenger on a freight train of the defendant, traveling from Chicago to New York, and was looking after a lot of cattle which he had shipped thereon as a passenger with the consent

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of defendant; that on the morning of that day the train stopped at Brockton station in New York, when plaintiff proceeded, as was his custom, to inspect the cattle, and was obliged, in doing so, to walk on top of the cars. The first count avers: "That it was the custom of the defendant at said station to have trains stop to take on water; that as soon as the train stopped to take on water, if the train had to go backwards or forwards to get into position so as to take water from the tank, in either of said cases it was the custom and duty of the defendant to ring the bell or blow the whistle to notify parties of the movement of the train. Plaintiff further avers that, relying on said custom and duty, he was descending on the ladder of one of the cars for the purpose of inspecting cattle, when, without any sign or warning or notification whatsoever, the said engineer in charge of said train suddenly started said train, whereby plaintiff was caught between two of the cars of said train by and through the carelessness and negligence of said defendant, by means whereof the plaintiff was then and there crushed, wounded, and bruised, etc., and permanently injured," etc. The second count avers: "That it was plaintiff's duty to go from car to car to look after the cattle, and he was employed for that duty by the owners of the cattle who had shipped the same; that two of the cars were in a defective and ruinous and dangerous condition, owing to the bumpers being out of repair, so that, when the said train of cars was backed up or pushed forward, the said two cars would go within six inches of each other, owing to the defective condition of said bumpers, which defective condition of said bumpers was well known to the said defendant, and which was then and there unknown to the plaintiff. That the ladder on said cars for getting down from one car to another or to look from one car to another was on the end of the cars; and about a minute after said train had stopped to take in water at Brockton station, plaintiff, as was his custom, began to descend from one of said cars on the end ladder, there being no other ladder on the said car; and just as the plaintiff had commenced to descend on said ladder, the said defendant suddenly and without warning backed said train of cars, and by reason of the defective condition of said bumpers on said two cars, from one of which the plaintiff was descending as aforesaid then and there, the said cars came so close together that they crushed the said plaintiff against said

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ladder, inflicting internal injuries, etc., as alleged in first count." Third count avers: "That the plaintiff walked to the first car containing the cattle, and was about to descend the ladder of said car, for the purpose of examining all his cattle, which were in twenty cars of said train, and as he began to descend the first car, which was next to the dead freight car, the defendant, without any warning or sign whatsoever, suddenly back the train, causing the dead freight car to bump against the cattle car which plaintiff was descending, and by means of such negligence in not giving any warning of the movement of said train, and also by means of the negligence of the defendant in having improper bumpers on the dead freight car, which bumpers did not correspond with the bumpers on the cattle car which plaintiff was descending, in consequence of which want of corresponding of said bumpers on said dead freight car and said cattle car then and there caused the said two cars to come very close together, whereby plaintiff was caught between said dead freight car and said cattle car, whereby he was injured as alleged in first count." Additional count charges that plaintiff walked to the front car containing the cattle, after said train had come to a full stop, and plaintiff was about to descend the ladder of said first or front car for the purpose of examining the cattle; that he had begun to descend the car which was next to the dead freight car, when the defendant, without any warning or signal whatever, suddenly and negligently backed said train, driving said dead freight car against the cattle car from which the plaintiff was descending, by means of which negligence the defendant, in not giving any warning or signal of the movement of the said train, and also by means of the negligence of the defendant in having improper bumpers on the said freight car, which bumpers did not correspond with the bumpers of the said cattle car from which plaintiff was descending, caused said two cars to come very close together, whereby plaintiff was caught between the two cars and injured, and prevented from attending to and transacting his affairs and business, and totally disabled from attending to any sort of business whatever.

Walker & Eddy, for appellant.

Moses Salomon and Brandt & Hoffmann, for appellee.

MAGRUDER, J. (after stating the facts).—The first conten-

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tion of the appellant is that the court refused to give the first instruction asked by the defendant below, which was that the evidence was insufficient to maintain the plaintiff's case as charged in his declaration, and that, therefore, the verdict should be for the defendant. We think that there was sufficient evidence tending to establish a cause of action to justify the submission of the case to the jury. Twenty cars of the freight train were carrying the cattle of which plaintiff had charge. Between these and the engine were three or four box cars containing dead freight. The collision causing the injury occurred between the forward cattle car and the hindmost dead freight car. At the rear of the cattle cars was a caboose in which appellee rode between stations. When the train stopped for coal, water, or any other purpose, appellee visited the cattle cars by walking beside them to see if the cattle were in proper condition. Cattle thus transported must have light and air, and must be fed and watered. They become frightened and unmanageable. They kick or gore, or fall down, and cannot rise. The strong crowd and suffocate the weak. They suffer from the mode of locomotion and the length of the journey. 3 Am. & Eng. Enc. Law, p. 2. Here the ordinary way of getting the cattle up if they were down was by walking by the sides of the cars when the train stopped, and punching the cattle with a pole. Appellee carried a pole for that purpose. There were, however, doors on top of the cars,—two doors on the top of each car, "one on each end, opposite each other, on each side of the roof." These doors were for use by the drover while the cars were in motion, if any emergency required their use. There was a door on each side of each car, but no door at either end of each car. There were no ladders on the sides of the cars. The ladders were at the ends of the cars. When the drover was on top of a car at the time of the stopping of the train, the only way in which he could alight so as to walk on the ground and examine his cattle from the sides of the cars was by descending on the ladder at the end of the car. One of appellant's witnesses testifies that the "drover generally gets down when we stop for coal or water at a place, as soon as he can. It is his duty to do so. He is delaying himself when he delays us." At Westfield, eight miles west of Brockton, appellee commenced with the rear cattle car next to the caboose to examine his cattle, but had only examined two or

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three cars when the train started, and he was obliged to enter the caboose. Knowing that the train would stop at Brockton from 10 to 20 minutes, he walked on top of the train until he reached the forward car of the 20, and, when the train stopped, attempted to descend by the ladder at the forward end of the car, so that, in walking back and inspecting the cattle, he might reach the caboose about the time the train would start. When appellee commenced his descent of the ladder, there was sufficient room for his body between the car he was on and the car immediately in front. When he had descended to a point where his waist was on a level with the top round of the ladder, the train was moved, so that the space between the two cars was reduced to about six inches, and his hips and bowels were crushed between them. The evidence tends to show that under all the circumstances the appellee had a right to be on top of the freight car, where he was, and to descend by the ladder at the end of the car when the train stopped. The real cause of the injury was the fact that when the cars of the train were shoved together the space between them was too narrow to admit of a safe descent upon the ladder.

The declaration sufficiently charges that the cars were thus brought so close together as to produce the injury. It makes no difference whether the narrowness of the space between the cars when shoved together was brought about by the bumpers being out of repair or otherwise defective, or by a want of correspondence between the bumper on the cattle car and that on the dead freight car, or by any other cause. The plaintiff may aver in his declaration as many grounds of recovery as he sees proper, but it is not necessary to prove all that is alleged. It is sufficient to prove enough of the negligence charged to make out a case. *Wagon Co. v. Kehl*, 139 Ill. 644. We are relieved from the consideration of the question as to the duty of a railroad company to furnish its employees and servants with safe machinery and structures, and with a safe place and surroundings for the performance of their duties, and as to the assumption by such servants of the ordinary hazards and risks of their employment; for, although the evidence tends to show that appellee had control, to some extent, of the cattle which the company was transporting, and assumed the duty of looking after the condition of the cattle, yet we do not regard the relation existing between him and the company as that of employee and employer. The relation between them

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was that of carrier and passenger. The declaration charges that appellee was a passenger, and we think the evidence tends to sustain the allegation. It does not appear whether the appellee had what is called a "drover's pass" or not. A person who is traveling, with the consent of the railroad company, upon a freight train in charge of stock or goods carried by the company for him is a passenger. *Railway Co. v. Beaver*, 41 Ind. 493; *Lawson v. Railroad Co.*, 64 Wis. 447. Party in charge of live stock on freight train is a passenger.

Even where such a person is traveling in charge of cattle on a drover's pass, he is a passenger for hire. The consideration of his passage is the service he renders in taking care of the cattle or the charge made against him or his employer for shipping the cattle. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Horst*, 93 U. S. 291; *Railroad Co. v. Curran*, 19 Ohio St. 1, 3 Am. & Eng. Enc. Law, p. 16, and cases cited in notes; *Railroad Co. v. Brown*, 123 Ill. 162, 31 Am. & Eng. R. Cas. 61. A carrier will be held to the same strict accountability for the negligence of its servants resulting in injury to a passenger who is lawfully and properly on a freight train as governs its liability for such negligence when the transportation is upon a train devoted to passenger service exclusively. *Railroad Co. v. Arnol*, 144 Ill. 261, 58 Am. & Eng. R. Cas. 411. Being a passenger, appellee was not chargeable with notice of defects in the construction or condition of the cars. "As to the selection of suitable machinery and cars, the fitness of the road both as to the manner of construction and materials used, and in the use of all appliances adopted for the government or moving of trains, and as to the retention of competent and faithful servants, the carrier of passengers is obligated to use the highest reasonable and practicable skill, care, and diligence." *Railroad Co. v. Pillsbury*, 123 Ill. 9, 31 Am. & Eng. R. Cas. 24; *Pennsylvania Co. v. Roy*, 102 U. S. 455, 1 Am. & Eng. R. Cas. 225. The happening of an accident to a passenger during the course of his transportation raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests upon the carrier. Undoubtedly the law requires the plaintiff to show that the defendant has been negligent. But where the plaintiff is a passenger, a *prima facie* case of negligence is made out by showing the happening of the accident. If the injury to a passenger is caused by

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apparatus wholly under the control of the carrier, and furnished and applied by it, a presumption of negligence on its part is raised. *Gleeson v. Railroad Co.*, 140 U. S. 435; *Miller v. Steamship Co.*, 118 N. Y. 199; *Railroad Co. v. Yarwood*, 15 Ill. 468, 17 Ill. 519; *Railway Co. v. Engel*, 35 Ill. App. 491; *Railway Co. v. Thompson*, 56 Ill. 141; *Packet Co. v. Defries*, 94 Ill. 598; *Railway Co. v. Cotton*, 140 Ill. 493. Proof that plaintiff was a passenger, that the accident happened, and that the injury was inflicted, imposes upon the carrier the duty to explain or account for the accident, and to prove that it resulted from a cause for which the carrier should not be held responsible. *Railway Co. v. Engel*, *supra*; *Railway Co. v. Thompson*, *supra*. The circumstances of exculpation are its matter of defense. *Gleeson v. Railroad Co.*, *supra*. Here an injury was proven to have happened to a passenger while descending from a train of cars in the manner and under the circumstances already stated. We think that a *prima facie* case of negligence was made out sufficient to throw upon appellant the burden of proving that the injury was not its fault. Whether or not the defendant offered such explanation of the accident as to relieve itself from the charge of negligence, and whether or not the plaintiff exercised due care for his own safety, were questions of fact for the jury, and were submitted to them by the court under proper instructions.

Complaint is made that several other instructions asked by appellant were refused. Without entering into a critical examination of all these instructions, we deem it sufficient to point out two defects in them which justified the action of the court in refusing them. In the first place they undertake to tell the jury that certain specified facts constitute negligence.

Negligence is a question of fact. It is for the jury to determine whether the defendant has been guilty of negligence under all the evidence in the case. The question is one of fact, and the facts are for the jury. It is not the province of "the court to tell the jury that certain facts constitute negligence." *Pennsylvania Co. v. Frana*, 112 Ill. 398. In the second place, the court was asked to instruct the jury that the evidence applicable to each separate count of the declaration was not sufficient to sustain plaintiff's charge of negligence as made in that count. These instructions were not proper, because by them the court was made to pass upon

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the sufficiency of the evidence instead of leaving it to the jury to pass upon it. They were in no way different from the first instruction asked by the defendant, except that they refer to each count of the declaration instead of referring to the whole declaration. Instructions.

An objection was made to certain testimony admitted by the court on behalf of plaintiff, which we would be inclined to regard as well taken under the doctrine of the case of *Railway Co. v. Friedman*, 146 Ill. 583, if the record did not show a waiver by appellant of the right to insist upon the objection. Appellee asked one of his witnesses what were the average weekly earnings of a cattle drover traveling with and caring for cattle shipped on cars; and he was allowed to answer, over the objection of appellant, to which ruling exception was taken. The objection was that there was no allegation in the declaration of special damages by reason of the loss of wages. On the morning after the evidence was introduced, counsel for appellee admitted in open court that the evidence might be subject to technical objection, and made a motion that it be stricken out and excluded from the jury, and proposed to ask an instruction to the jury to disregard it; but counsel for appellant opposed the motion, and objected to the exclusion of the evidence, and the court overruled the motion. We fail to see how counsel for appellant can now complain that the evidence was allowed to remain in the case, when they themselves opposed its exclusion, and objected to its withdrawal from the consideration of the jury. Finding no error in the record sufficient to justify a reversal of the judgment, we are of the opinion that the judgment of the appellate court should be affirmed, and it is accordingly so ordered. Opposing a motion to strike out evidence is waiver of objection thereto. Affirmed.

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SLOANE *et al.*

v.

SOUTHERN CALIFORNIA RAILWAY CO.

(*Supreme Court of California, March 23, 1896.*)

Damages for Wrongful Expulsion from Train.—Where a passenger, after changing cars, is required to leave the train for want of her ticket, which had been taken up by the conductor of the first train without giving her any check therefor, her right of action is not limited to the breach of the contract to carry her to her destination, but includes full redress for the wrongs sustained through defendant's violation of the duty which it assumed as a common carrier in entering into such contract.

Ejectment of Passenger—Damages for Nervous Shock.—Where the excitement and indignity of plaintiff's wrongful expulsion from defendant's train brought about a recurrence of insomnia and nervous paroxysms to which she had been previously subject, it was held that she might recover therefor, whether defendant knew of her susceptibility to nervous disturbance or not.

Cause of Nervous Shock is Question for Jury.—Whether expulsion of plaintiff from defendant's train was the proximate cause of ensuing nervous paroxysms is a question for the jury.

Denial by Party of Allegation Presumptively within His Knowledge.—The denial of an allegation in the complaint for want of sufficient information and belief to enable the defendant to answer the same, may be stricken out, if the matter is presumptively within the knowledge of the defendant.

Denial by Corporation on Information and Belief.—A corporation cannot base its denial on want of information and belief, if the matters alleged are presumptively within the knowledge of any of its officers.

Duty of Conductor who Takes up Ticket.—A conductor who takes up a passenger's ticket must see that the latter is provided with the means of continuing his journey.

APPEAL from Riverside county superior court. *Modified.*

W. J. Hunsaker, for appellant.

Sweet, Sloane & Kirby and *Works & Works*, for respondents.

HARRISON, J.—The plaintiff, Annie L. Sloane, purchased a ticket, April 8, 1894, from the agent of the defendant, at North Pomona, for passage from that place to San Diego, and on the same day took passage upon the regular passenger train

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of **the** defendant. Before reaching San Bernardino the conductor of the train took up her ticket, without giving her any **check** or other evidence of her right to be carried to San Diego, and on arriving at San Bernardino she was required to **change** cars, and enter another train of cars of the defendant. After entering this train of cars the conductor in charge thereof demanded of her her ticket, and upon her stating to him that she **had** given it to the conductor of the other train, and the **circumstances** therewith, she was informed by him that she **must** either pay her fare or leave the train. She had no **money** with her, and when the train reached East Riverside she **left** the car. After getting off the train, she started to **walk** back as far as Colton upon the railroad track, a distance of **about** three miles, but, after walking a portion of the way, **secured** a seat in a passing vehicle, and was carried to Colton, **where** she spent the night with her sister-in-law. On the next **day**, having borrowed some money with which to purchase **another** ticket, she resumed her passage, and was carried to San Diego. The present action was brought to recover **damages** sustained by reason of the wrongful acts of the defendant's agents. The cause was tried by a jury, and a **verdict** rendered in favor of the plaintiffs for the sum of \$1,400. From the judgment entered thereon, and an order denying a **new** trial, the defendant has appealed.

It is contended by the appellant that, as the plaintiff left the car at East Riverside in accordance with the previous **directions** of the conductor, and no personal violence was used or **displayed** towards her, her only right of action is for a **breach** of the defendant's contract to carry her to San Diego, and **that** the extent of her recovery therefor is the price paid for **the** second ticket, and a reasonable compensation for the **loss** of time sustained by her. The plaintiff's right of action **against** the defendant is not, however, limited to the breach of **its** contract to carry her to San Diego, but **includes** full redress for the wrongs sustained by **her** by reason of the defendant's violation of the **obligations** which it assumed in entering into such **contract**. If she was wrongfully prevented by the defendant from completing the passage to San Diego for which it had **contracted** with her, she could either bring an action simply for **the** breach of this contract, or she could sue it in tort, for **its** violation of the duty, as a common carrier, which it assumed

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upon entering into such contract. *Jones v. The Cortez*, 17 Cal. 487; *Head v. Railroad Co.*, 79 Ga. 358; *Carsten v. Railroad Co.*, 44 Minn. 454, 44 Am. & Eng. R. Cas. 392. The complaint in the present case is not merely for the breach of the contract, nor is it merely for the wrong committed in excluding her from the car, but it is to recover the damages sustained by her by reason of the wrongful acts of the defendant committed in the violation of its contract. It is in the nature of an action on the case, arising out of the conduct of the defendant in wrongfully depriving her of her ticket, and thereafter, by reason of such wrongful act, excluding her from its car, and refusing to carry out its contract. Although her action is for the tort resulting from the defendant's conduct, the wrong which produced that result was twofold,—depriving her of the evidence of its contract to carry her to San Diego, and afterwards excluding her from its car for failure to produce the evidence of which it had wrongfully deprived her. For the purpose of giving her this right of action, it is immaterial that these different acts were by different agents of the defendant. If the conductor who took up the ticket had himself, at a subsequent point in the trip, excluded her for failure to exhibit it, the liability of the defendant would not be questioned. Its liability is the same, notwithstanding, for its own convenience, it has intrusted the management of its train to different conductors. *Muckle v. Railroad Co.*, 79 Hun 32, 29 N. Y. Supp. 732. The plaintiff was not called upon to question the right of the first conductor in taking up her ticket, and it was the duty of the defendant to see that she was not thereby deprived of her right to a passage upon its cars.

In her testimony regarding her exclusion from the cars, the plaintiff recounted the interview between her and the conductor, and the manner in which she was directed to leave the car, and it was claimed at the trial that she had been thereby subjected to humiliation and indignity, for which she was entitled to redress. Counsel for the appellant does not question, as a proposition of law, that, if the conductor was insulting and violent in removing her, such treatment forms an element of damage to be recovered by her; but he maintains that the evidence fails to show such conduct. The evidence was, however, before the jury, and they were properly instructed in reference thereto; and, although it might be urged

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upon them that this evidence was insufficient to establish such conduct, we cannot say, as a matter of law, that it was not proper to submit the question to their judgment.

Evidence was given at the trial tending to show that Mrs. Sloane had been previously subject to insomnia, and also to nervous shocks and paroxysms, and that, owing to her physical condition, she was subject to a recurrence of these shocks or nervous disorder if placed under any great mental excitement; and that, by reason of the excitement caused by her exclusion from the car, there had been a recurrence of insomnia and of these paroxysms. The court instructed the jury that, if they found for the plaintiffs, "in assessing damages, if it appears from the evidence that the plaintiff Annie L. Sloane was wrongfully deprived of her right to ride on defendant's cars, and expelled therefrom in a manner and under circumstances calculated to inflict, and which did inflict, feelings of indignity and insult, the jury is authorized to consider, under the evidence, the injured feelings of the plaintiff, the indignity endured, her mental suffering, the humiliation and wounded pride which one in her condition of life and standing in the community would experience, together with any bodily harm or suffering occasioned, and to award such an amount for damages as will compensate her for such humiliation, suffering, and other detriment." The jury were not specially instructed with reference to any damages that might have been sustained by reason of the recurrence of this disturbance of the nervous system, but it is reasonable to suppose that the above evidence was offered by the plaintiff for the purpose of recovering damages for the injury that might be thus established, and that, under that portion of the above instruction in which the jury were authorized in assessing damages to consider "any bodily harm or suffering occasioned" by the expulsion of Mrs. Sloane from the cars, it was intended that they should consider this evidence, and the injury which it established. The defendant objected to the introduction of the evidence, and excepted to the instruction, and insists that under no circumstances could the jury consider this effect upon the plaintiff as an element of damage for which the defendant is liable; that the court should not have directed the jury to consider any mental suffering experienced by her.

Counsel for the appellant has discussed, in his brief, the

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want of liability on the part of the defendant for any damages for mental suffering, and has cited many authorities in support of the proposition that mere mental anxiety, unaccompanied with bodily injury or apprehended peril, does not afford a right of action. To the extent that the term "mental suffering" is included in the above instruction, this proposition is inapplicable. The term, as there used, is to be construed with reference to the context in which it occurs. The "mental suffering," there named, is not the mental anguish or pain referred to in the above proposition cited by the appellant, but is the mental experience which is concomitant with the insult, indignity, and humiliation named in the instruction. It would be a contradiction of terms to hold that the individual whose pride had been humiliated, or whose dignity had been insulted, had no mental suffering in connection therewith, or that this humiliation and insult did not of themselves constitute mental suffering; that he could have redress for the injured pride, but not for the mental suffering it produced. Although mental suffering alone will not support an action, yet it constitutes an aggravation of damages when it naturally ensues from the act complained of. 3 Suth. Dam., § 1245.

The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centres of the body are a part of the physical

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system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.

This subject received a very careful and elaborate consideration in the case of *Bell v. Railway Co.*, L. R. 26 Ir. 428. Mrs. Bell was a passenger upon one of the defendant's trains, and by reason of the defendant's negligence in the management of its train suffered great fright, in consequence of which her health was seriously impaired. She had previously been a strong, healthy woman, but it was shown that, after this occurrence, she suffered from fright and nervous shock and was troubled with insomnia, and that her health was seriously impaired. The jury were instructed that if, in their opinion, great fright was a reasonable and natural consequence of the circumstances in which the defendant by its negligence had placed her, and that she was actually put in fright by those circumstances, and if the injury to her health was, in their opinion, the reasonable and natural consequence of such great fright, and was actually occasioned thereby, the plaintiff was entitled to recover damages for such injury. It was objected to this instruction that, unless the fright was accompanied by physical injury, even though there might be a nervous shock occasioned by the fright, such damages would be too remote. In holding that this objection was not well founded, and that the nervous shock was to be considered as a bodily injury, the court held that, if such bodily injury might be a natural consequence of fright, it was an element of damage, for which a recovery might be had, and, referring to the contention of the defendant, said: "It is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation cannot in law exist in the case of a similar act producing upon the same structures an effect which at a

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subsequent time—say a week, a fortnight, or a month—must result without any intervening cause in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration.” At the close of its opinion, Lord Chief Baron PALLES says: “In conclusion, I am of the opinion, that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down as a matter of law that, if negligence cause fright, and such fright in its turn so affect such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury accompanied such negligence in point of time.” This case is quoted at great length and with approval in the eighth edition of Mr. Sedgwick’s treatise on Damages, at section 860. Mr. Beven, in the recent edition of his work on Negligence (volume 1, pp. 77–81), also comments upon it with great approval. In *Purcell v. Railroad Co.*, 48 Minn. 134, 50 N. W. 1034, the defendant so negligently managed one of its cars that a collision with an approaching cable car seemed imminent, and was so nearly caused that the attendant confusion of ringing alarm bells and of passengers rushing out produced in the plaintiff, who was a passenger on the car, a sudden fright, which threw her into convulsions, and, she being then pregnant, caused in her a miscarriage, and subsequent illness. The court held that the defendant’s negligence was the proximate cause of the plaintiff’s injury, and that it was liable therefor, even though the immediate result of the negligence was only fright, saying: “A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system.” See also *Canning v. Inhabitants of Williamstown*, 1 Cush. 451; *Seger v. Town of Barkhamsted*, 22 Conn. 290; *Car Co. v. Dupre*, 54 Fed. Rep. 646; *Stutz v. Railroad Co.*, 73 Wis. 147, 37 Am. & Eng. R. Cas. 187; *Razzo v. Varni*, 81 Cal. 289. “It is a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even though the harm done consists mainly of nervous shock.” *Warren v. Railroad Co.*, 163 Mass. 484.

The mental condition which superinduced the bodily harm

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in the foregoing cases was fright, but the character of the mental excitation by which the injury to the body is produced is immaterial. If it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury. Whether the indignity and humiliation suffered by Mrs. Sloane caused the nervous paroxysm, and the injury to her health from which she subsequently suffered, was a question of fact, to be determined by the jury. **Cause of nervous shock is question for jury.** There was evidence before them tending to establish such fact, and if they were satisfied, from that evidence, that these results were directly traceable to that cause, and that her expulsion from the car had produced in her such a disturbance of her nervous system as resulted in these paroxysms, they were authorized to include in their verdict whatever damage she had thus sustained. Whether the defendant or its agents knew of her susceptibility to nervous disturbance was immaterial. She had the same rights as any other person who might become a passenger on its road, and was entitled to as high degree of care on its part. It was not necessary that this injury should have been anticipated in order to entitle her to a recovery therefor. Civ. Code, § 3333. If the facts under which she was excluded from the car would be an act of negligence on the part of the defendant as to any and all persons, whoever might sustain injury by such act would be entitled to recover to the full extent of his injury, irrespective of his previous physical condition or susceptibility to harm. In *Railroad Co. v. Kemp*, 61 Md. 74, 18 Am. & Eng. R. Cas. 220, and 61 Md. 619, the plaintiff was injured upon a car of the defendant, and thereafter a cancer developed itself upon her breast at the place where she had been hurt. Testimony was given to the effect that such hurt was sufficient to cause the development of the cancer, and that, in the opinion of the experts, they would attribute it to that cause. It was shown that, previous to the accident, she had been in apparently good health and condition. The court held that it was for the jury to determine, from the evidence, whether the cancer did result from the injury, and, if so, that the defendant was liable, even though it had no reason to anticipate such a result. "It is not for the defendants to say that, because

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they did not or could not in fact anticipate such a result of their negligent act, they must therefore be exonerated from liability for such consequences as ensued. They must be taken to know and to contemplate all the natural and proximate consequences, not only that certainly would, but that probably might, flow from their wrongful act." See, also, *Fell v. Railroad Co.*, 44 Fed. Rep. 253.

The court properly left to the jury to determine whether Mrs. Sloane exercised reasonable prudence in undertaking the walk from East Riverside to Colton, and, if so, that the injury sustained by her was a proper element of damage to be recovered. It could not say, as matter of law, or instruct the jury, that under the evidence before them, such walk was or was not necessary, or whether the route selected by her was the most feasible; nor would it have been justified in directing them not to allow compensation for any injury sustained by the walk, upon the ground that, if she had waited a few hours, she could have gone upon the cars. *Malone v. Railroad Co.*, 152 Pa. St. 390.

The refusal of the court to strike out certain portions of the complaint as irrelevant is not a ground for reversal of the judgment. The matter embraced therein was relevant to the plaintiff's right of recovery, and they were justified in setting forth in their complaint the several acts of the defendant which constituted the wrong for which they sought redress. The defendant does not claim to have been prejudiced by any of the probative matters contained in these allegations, and, even if this matter might have been properly struck out by the court, after the cause has been tried upon its merits the judgment will not be reversed for such technical error.

The demurrer to the complaint was properly overruled. The cause of action set forth therein is neither ambiguous nor uncertain. It clearly states a single ground of recovery, viz., the unlawful violation by the defendant of the obligation it had assumed to carry Mrs. Sloane to San Diego; and, although the damages caused to her by this violation of its obligation were made up of the injuries to her person, as well as the money paid by her as the consideration of this obligation, they all resulted from the wrong committed by the defendant. It was necessary that she should point out the particulars in which she had sustained injuries from the defendant—the humiliation, injuries to her health, etc.,—in order that evi-

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dence thereof might be given at the trial, and also that the defendant might be prepared to meet such evidence; but it was not necessary that she should designate the particular amount of damage which she had sustained by reason of the indignity that she had been compelled to undergo, distinct from the amount sustained from the injury to her health. These elements of damage were not capable of computation, nor would evidence of such amount have been admissible. This amount was to be determined by the jury, in the exercise of an intelligent discretion.

Neither does the action of the court in striking out a portion of the defendant's answer justify a reversal of the judgment. The denial of an allegation in the complaint for want of sufficient information and belief to enable the defendant to answer the same justifies the court in disregarding or striking out such denial, if the matter is presumptively within the knowledge of the defendant; and, although a corporation does not itself have any knowledge of the matters alleged, but is compelled to act through its officers, whose information may be derived from others, yet it cannot place its denials upon its want of information and belief, if the matters alleged were presumptively within the knowledge of any of its officers, even though the officer verifying the answer was himself without any information or belief upon the subject. In the present case it, moreover, clearly appears that the defendant was not prejudiced by the action of the court. In a separate defense to the action, the defendant directly alleged many of the facts which, in the portion of the answer thus struck out, it had denied for want of information and belief; and, although an admission in one defense is not available as against a denial in another, it is competent for the court to consider such admission for the purpose of determining whether the answer containing the denial is sham or evasive. After the ruling of the court, the defendant amended its answer by directly denying the matters alleged in one of the paragraphs which the court held had been insufficiently denied, and at the trial it stipulated to the truth of the matters that had been denied by it in another of the paragraphs which was stricken out. The defendant was, therefore, not precluded from defending the action in any particular upon which it relied. After a cause has been tried

Denial by party
of allegation
presumptively
within his
knowledge.

Denial by corporation on information and belief.

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upon its merits a ruling of the court either in striking out, or in refusing to strike out, a portion of a pleading, will not justify a reversal of the judgment, if it appears that the party against whom the ruling was made has not been prejudiced thereby, and has been able to present to the court his entire cause of action or defense. Mere technical error, unaccompanied by injury, will be disregarded. Code Civ. Proc., § 475.

The court did not err in its instructions to the jury respecting the measure of care which a railroad company must exercise towards its passengers. Rorer, R. R., p. 951; Railroad Co. v. Homer, 73 Ga. 251, 27 Am. & Eng. R. Cas. 186. The passenger is not required to question the action of the conductor in taking up his ticket, but has to assume that his conduct in taking or withholding the ticket is in accordance with the rules of the company. It is therefore incumbent upon the conductor to exercise more than ordinary care in seeing that, after he has taken the ticket from the passenger, the latter shall be provided with the means of continuing his journey. It is not error to hold that this requires extreme care and diligence. We are of the opinion, however, that the damages allowed by the jury were excessive, and not justified by the evidence. They were properly told that they could not award the plaintiff exemplary damages, but only such as would be a full and fair compensation to her for the injury and detriment she had suffered as the proximate results of the defendant's wrongful acts. The testimony tending to show that the conductor was rude and insulting in directing her to leave the train at East Riverside is quite meagre, and consists more of her statement of its character than of the language used by him. The jury were instructed that, in estimating the amount of damages she could recover by reason of the humiliation in being excluded from the car, they were not at liberty to consider her peculiar nervous temperament, but to allow only such damages as would have resulted to a person of ordinary or usual temperament. So, too, the evidence concerning the effect of this expulsion from the car upon her nervous condition consists more of general statements than of details, and it does not appear that this effect was of more than brief duration. She does not claim to have sustained any direct physical injury by reason of the walk to Colton. She testifies, as do also her husband

Duty of conductor who takes up ticket.

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and Dr. Averill, that, except for her nervous condition, she was in fair health, and that she was abundantly able to take a walk of two or three miles, and it is not suggested that the walk had any effect upon her nervous condition, or that she suffered any direct inconvenience therefrom after her return to San Diego. The walk itself was not attended with any unusual inconvenience. It was upon the railroad track, in a level country, on an afternoon in April. The distance is not given, but, after going about a mile, or as far as the railroad bridge, she was taken into a passing vehicle, and carried to Colton. While the amount of damages that may be awarded in a case like the present is in the discretion of the jury, it must be a reasonable and not an unlimited discretion, and must be exercised intelligently and in harmony with the testimony before them. We think that the jury in the present case must have been influenced by other considerations than the testimony before them in arriving at the amount of their verdict.

The judgment and order denying a new trial are reversed, unless the plaintiff shall, within 30 days after the filing of the remittitur in the superior court, file with the clerk and give to the defendant a stipulation remitting from the judgment the sum of \$1,000. If such stipulation be so filed and delivered, the superior court is directed to amend the judgment in conformity therewith, and thereupon the judgment and order shall stand affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

LOUISVILLE & N. R. Co.

v.

COMMONWEALTH.

(Court of Appeals of Kentucky, April 4, 1896.)

Statute Imposing Fine on Railroads for Charging Excessive Rates.—A penal statute imposing a fine upon railroads for charging more than a just and reasonable rate for the transportation of passengers and freight, is void for uncertainty, in failing to prescribe a standard as to what is just and reasonable.

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APPEAL from Marion county circuit court. *Reversed.*

Wm. Lindsay, J. W. Alcorn, E. W. Hines, Lisle & McChord, Walker D. Hines, and H. W. Bruce, for appellant.

W. J. Hendrick, W. H. Sweeney, and W. H. Rives, for the Commonwealth.

HAZELRIGG, J.—The indictment in this case charges that the appellant “did unlawfully charge, collect, and receive from A. Vancleave & Co., the sum of forty-one and $\frac{70}{100}$ dollars, as toll or compensation for the transportation of a car load of coal, weighing 53,800 pounds, being at the rate of one and $\frac{55}{100}$ dollars per ton, from Pittsburg, Ky., to Lebanon, in Marion county, over the line of said railroad, a distance of — miles, the said rate of one and $\frac{55}{100}$ dollars per ton, for the said transportation of said coal, being more than a just and reasonable compensation therefor, contrary to the form of the statute,” etc. A conviction followed, and from a judgment on the verdict of the jury for the sum of \$500, the company has appealed. Its complaints are that the statute prohibiting extortion by railroad companies, and providing a penalty therefor, prescribes no standard as to what is just and reasonable for the guidance of the corporation, and altogether fails to define what it may and what it may not do; that it is therefore void for uncertainty; that, even if the statute is valid, the indictment states no facts showing the appellant guilty of the offense charged, but only the conclusion of the pleader that the rate charged was more than a just and reasonable compensation. It is also urged that the trial court erred in refusing to grant to appellant a change of venue upon the testimony heard, and in the admission of incompetent evidence; and it further insists that, on the facts of the case, the charge is reasonable and just within the meaning of the statute, and especially so as the charge is within the rate allowed by the company’s charter.

The chief question to be considered is the one affecting the validity of the statute, the provisions of which are found in sections 816 and 819 of the Kentucky Statutes. The first-named section reads as follows: “If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or the use of any railroad car upon its track or upon any track it has control of, or has the right

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to use in this state, it shall be guilty of extortion." Section 819 fixes the penalty for the first offense at not less than \$500 nor more than \$1,000, and increases the penalty for subsequent infractions of the law. The circuit court of any county into or through which the road runs and the Franklin circuit court are given jurisdiction of the offense, the prosecution to be by indictment, or action in the name of the commonwealth, upon information filed by the board of railroad commissioners. That this statute leaves uncertain what shall be deemed a "just and reasonable rate of toll or compensation" cannot be denied; and that different juries might reach different conclusions, on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged. And this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law, and in violation of both state and federal constitutions, we are not able to comprehend the force of our organic laws. In *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, 19 Fed. Rep. 679, 16 Am. & Eng. R. Cas. 15, a statute very similar to the one under consideration was thus disposed of by the learned judge (BAXTER): "Penalties cannot be thus inflicted at the discretion of a jury. Before the

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property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a 'fair and just return' on its investments, it must, in order to the validity of the law, define with reasonable certainty what would constitute such 'fair and just return.' The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know, in advance of a verdict, whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of 4 per cent, while another might acquit an accused who had demanded and received at the rate of 6 per cent, rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms." The supreme court of the United States, in *Railroad Commission Cases*, 116 U. S. 336, refers to this Tennessee case, and substantially approves it by distinguishing the case then before the court from the Tennessee case. This case is also used to support the text in 8 Am. & Eng. Enc. Law, p. 935, where it is said: "Although a statute has been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable, in order to ascertain whether a penalty is recoverable, yet where the action is merely for recovery of the illegal excess over reasonable rates, this is a question which is a proper one for a jury." Mr. Justice BREWER, in the case of *Railway Co. v. Dey*, 35 Fed. 866, had under consideration the provisions of a statute similar to the one we have before us, and, while the statute was upheld, it was only because there was a schedule of rates provided in the act which rendered the test of reasonableness definite and certain. The learned judge there said: "Now the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable charge. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be

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sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In Dwar. St. 652, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke that acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters.' See, also, U. S. v. Sharp, Pet. C. C. 122, Fed. Cas. No. 16,264; The Enterprise, 1 Paine 34, Fed. Cas. No. 4,499; Bish. St. Crimes, § 41; Lieb. Herm. 156." And the learned judge concludes that there is very little difference between a provision of the Chinese Penal Code, which prescribed a penalty against any one who should be guilty of "improper conduct," and a statute which makes it "a criminal offense to charge more than a reasonable rate." The same learned judge, discussing the kindred subject of unreasonable differences in rates in Tozer v. U. S., 52 Fed. Rep. 917, said: "But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

When we look to the other side of the question, we find the contention of the state supported by neither reason nor authority. No case can be found, we believe, where such indefinite legislation has been upheld by any court when a crime is sought to be imputed to the accused. Manifestly, in actions by shippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury. It is, in fact, a question of contract. Common carriers are "bound to carry when called upon for that purpose, and charge only a reasonable compensation for the carriage. These are incidents of the occupation in which they are authorized to engage." Railroad Co. v. Blake, 94 U. S. 180. If the charge is more than is reasonable, there is a violation of the contract, and the suit of the person aggrieved is because of such violation. In some states the shipper is entitled to recover double or treble the amount of the excess, but this does not change the nature of the action. The nearest

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approach to an authority for the state's contention is a case in which the shipper sued the carrier, and is reported in *Railroad Co. v. Jones*, 149 Ill. 361. There the first section of the act under consideration, of which our statute is a substantial copy, was attacked for want of certainty in defining the act of extortion; the contention being that the determination of what is a fair and reasonable rate must depend upon a variety of considerations,—such, for instance, as the character of the freight, the necessity of dispatch, the cost of cleaning and unloading cars, the risk of liability as affected by the value of the articles carried, the volume of business, the amount of car room required, the difficulty of the service, the special attention demanded, etc. The court said that “the difficulties which stand in the way of determining what are reasonable rates also stand in the way of embodying in a legal enactment such an exact definition as is insisted upon. * * *

The first section of the statute is merely declaratory of a well-known principle of the common law. At common law the common carrier was obliged to receive and carry all goods offered for transportation upon receiving a reasonable hire (*Messenger v. Railroad Co.*, 36 N. J. L. 407, etc.); and the court was to judge of the reasonableness of the freight charges. * * *

Undoubtedly, the legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges. *Dow v. Beidelman*, 125 U. S. 680, 34 Am. & Eng. R. Cas. 322. But in the absence of statutory regulation upon the subject, the courts must decide what is reasonable.” As we have seen, the action was one by a shipper against the carrier, and was in the nature of a suit for damages for a breach of the contract. The court, however, made its meaning clear by referring to and approving its former construction of the act, as found in *Chicago, B. & Q. R. Co. v. People*, 77 Ill. 443, and of that case said: “But we held, in *Chicago, B. & Q. R. Co. v. People*, that the first section of this statute should be construed in connection with the eighth, and that the latter section, by providing for the making by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for each of the railroad corporations in the state, furnished a uniform rule for the guidance of the railroad companies. In that case we said: ‘When that is done, there will be a standard of what is fair and reasonable, and the statute can be conformed to and

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obeyed.' '' As this Illinois section appears to have been substantially re-enacted here, without, however, accompanying it with the provision for a standard, we quote the more freely from the Illinois court construing the section. In the case from 77 Ill. the court said: " That section, by itself, makes the offense to consist in taking more than a fair and reasonable rate of toll and compensation, without reference to any standard of what is fair and reasonable. In such case, it may be seen, different persons would have different opinions as to what is a fair and reasonable rate. Courts and juries, too, would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act, which in another place or at another time would be held to be no breach of the law, and what might be thought a fair and reasonable rate on one road might be considered otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with purpose of conforming to the law, might fix its rates at what it believed to be reasonable, and yet be subjected to the heavy penalties here prescribed. The statute furnishes evidence that it did not intend to leave the railroad in this state of uncertainty and danger, and exposed to such seeming injustice. The eighth section provides how reasonable rates shall be ascertained, what they shall be, and that the railroad and warehouse commissioners should make for each of the railroad corporations in the state a schedule of reasonable maximum rates; thus furnishing a uniform rule for the guidance of the railroad companies." These authorities and the argument abundantly supporting them are sufficient.

Other objections to the judgment below need not be discussed, as the one noted is fatal, and the statute cannot be enforced as a penal statute. It may be observed, further, however, that it would seem singular if such a statute, even if in all respects valid, could be enforced against a carrier whose rates, as fixed in its charter, are in excess of the rates alleged to be excessive in the indictment; and this, not because such rates are secured by an irrepealable contract, a matter not now considered, but simply because they at least remain the legal rates until changed by law. The judgment is reversed, with directions to dismiss the indictment.

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PENNSYLVANIA CO.

v.

EBAUGH.

(Supreme Court of Indiana, May 6, 1896.)

Use of Uneven Couplings or Dead-woods on Freight Cars.—It is not negligence for a railroad company to use, in regular transportation, cars constructed with uneven couplings or dead-woods, whether such cars are its own, or belong to another company,

APPEAL from Marion county circuit court. *Reversed.*

S. O. Pickens, for appellant.

W. V. Rooker, for appellee.

HACKNEY, C.J.—This suit was by the appellee against the appellant, and his complaint consisted of three paragraphs. One paragraph tendered the issue that the appellant had been negligent in requiring the appellee, a brakeman in its employ, to couple two freight cars, not owned upon the road, the draw-bars of which were not of uniform standard, but were such that one stood higher than the other, and that said cars were constructed with deadwoods, and with floors projecting over the ends of the sills, so that when he attempted to make the coupling his arm was caught between the deadwoods and crushed. As pertinent to this issue, the appellant requested the trial court to charge the jury that “it was not negligence for the defendant company to use cars on its railroad and in its yards, the couplings or deadwoods of which were not of uniform or equal height.” This charge was refused, but the court gave, as its own, the following: “(4) It is not negligence for the defendant company to use cars on its railroad and in its yards, the couplings or deadwoods of which were not of uniform or equal height, *provided the said deadwoods or couplings were in other respects safe appliances.*” The question is presented on behalf of the appellant as to the effect of the modification of the rule announced in the charge refused, as we find it in the words above italicized. The following

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decisions sustain the rule that it is not negligence for a railway company to use, of its own or those of another company, in regular transportation, cars constructed with uneven couplings or deadwoods: Railroad Co. v. Smithson, 45 Mich. 212, 1 Am. & Eng. R. Cas. 101; Smith v. Potter, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140; Railroad Co. v. Gildersleeve, 33 Mich. 133; Hulett v. Railway Co., 67 Mo. 239; Railway Co. v. Black, 88 Ill. 112; Railway Co. v. Asbury, 84 Ill. 429; Railroad Co. v. Flannigan, 77 Ill. 365; Whitwam v. Railroad Co., 58 Wis. 408; Kelly v. Abbot, 63 Wis. 307, 21 Am. & Eng. R. Cas. 633; Way v. Railroad Co., 40 Iowa 341; Baldwin v. Railroad Co., 50 Iowa 680; Railway Co. v. Higgins, 44 Ark. 293, 21 Am. & Eng. R. Cas. 629. Many of these cases illustrate the impracticability of transferring freight from the car of one company to that of another at each change of railway line or system; the absence of any regulation by which the cars of all lines or systems are required to be of uniform construction; and the propriety of the rule which requires the brakeman, whose duty involves the coupling of cars, to increase his care in proportion to the necessarily increased dangers from the varied forms of construction as they come under his observation in the course of business. In the case of Railroad Co. v. Smithson, *supra*, in an opinion by Judge COOLEY, the proposition is made clear that, when the course of business brings together two cars of different companies, the brakeman must use his own eyes for notice that such cars have deadwoods upon them, or that the couplings are not of equal height, and it is there said: "It does not follow that laborers must sacrifice life or limb in order to meet this great public necessity. It is certain that there must be brakemen and switchmen, and that these must be called upon to perform the somewhat hazardous act of coupling cars, and of making up trains of cars of different constructions. But the act is dangerous—First, because inevitable accidents will sometimes occur; and, second, because, even in the most exposed positions, men will sometimes be wanting in ordinary prudence. But, when accident or negligence intervenes, any business is dangerous. The difference in danger is only in degree. There are more risks in operating a mill by steam than by water, but this does not prove the use of the steam engine to be negligence in the mill owner. The same remark may be made of different cars. One construction of car may render

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necessary a higher degree of care in coupling than another calls for; but there is no ground whatever for imputing to this defendant or any other railroad company, legal negligence for that which was a necessity of its business, and which all persons in its employ must be presumed to have known was a necessity." In this case the appellee testified that after he went to work upon the line in question he learned that "the cars used on that division were equipped with deadwoods," and that he knew a part, at least, of the Pennsylvania Company's cars were so equipped. It was also testified by another that the cars which caused the injury did not vary from the general rule. They were the standard cars,—the standard Pennsylvania coal cars. And it was testified, also, by another, that cars with deadwoods such as described were run into Indianapolis on all roads; that they were in use by others than the Pennsylvania Company, because they were considered safer by all railroad men; that 75 out of 100 would prefer coupling a car with deadwoods. The necessities of the position of brakeman, and the knowledge possessed by the appellee, charged him with the duty of looking for increased hazards, and of exercising greater care when cars of different construction were to be coupled. It should be remembered that the case presents no question of defective construction or of ill repair. It is simply a question of difference in form of construction. The charge given recognizes the rule that it was not negligence to take the cars upon the road and to place them in the train, and it was, perhaps, needless that we should have said so much in support of that rule; but the words of the charge in italics ingraft an unauthorized condition upon the rule. There was no allegation or issue that the "couplings or deadwoods" were unsafe, otherwise than by the form of construction. The charge directed the jury that the appellant was not negligent in using cars with uneven couplings or deadwoods, "provided said deadwoods or couplings were, in other respects, safe appliances." Giving the proviso its natural and necessary force, it not only introduced a condition to the rule of nonnegligence, which condition was unauthorized by any issue, but it required more of the appellant than the law would have required if the appliances named had been alleged otherwise unsafe. It is a matter of common knowledge that the coupling of freight cars is, at best, a very hazardous act; that, if the buffers and drawheads are not

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uneven, the task involves a high degree of care to avoid the necessary dangers; and that no practicable system of coupling freight cars, with safety to the person making the coupling, has been devised. The obligation of railway companies is to use ordinary care to supply reasonably safe appliances for coupling, and they are not required to furnish safe appliances where, from the nature of the business, safety is not possible. Nor are they required to provide the best or the most approved, or any particular design of, appliances. *Railway Co. v. McCormick*, 74 Ind. 440; *Car Co. v. Parker*, 100 Ind. 181; *Power Co. v. Murphy*, 115 Ind. 566, and cases cited above. In the first of the cases just cited it was said: "The master's obligation is not to supply the servant with absolutely safe machinery, or with any particular kind of machinery, but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary or unreasonable danger. When a master employs a servant to do a particular kind of work, with particular kind of implements and machinery, the master does not agree that the implements and machinery are free from danger in their use; but he agrees that such implements and machinery to be used by the servant are sound, and fit for the purpose intended, so far as ordinary care and prudence can discover. As we have already seen, the question here at issue did not involve any inquiry as to an imperfection or danger in the appliances named, excepting in the lack of uniformity in height. Other imperfections in them, or dangers in their use, were not the subject for instruction from the court. The proviso in the instruction given could but suggest that it was indispensable to a freedom from negligence in the use of uneven couplings or deadwoods that they should be otherwise safe appliances. This, in our opinion, was erroneous. In another instruction the court charged, generally, that the duty of a master towards his servant was to use ordinary care in furnishing reasonably suitable and safe appliances in the service. This general charge does not cure the error of the particular charge, either in assuming an issue not made, or implying a burden not recognized by the law.

It is objected by the appellee that the instructions asked by the appellant and refused by the court are not in the record, for the reason that they were asked as an entirety, and there was no exception to the refusal to give them as an entirety. The court's refusals were several, and the appel-

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lant's exceptions were several, and the action of the court and the exceptions so taken are brought into the record with reference to the several charges so asked. This practice has never been condemned by this court, and we do not observe its analogy to the practice upon joint exceptions, which are sought to be presented severally. If appellant's instructions were not in the record, the error here found is predicated upon the charge given by the court, which is not claimed to be out of the record.

It is also complained by the appellee that the evidence is not in the record, because no order-book entry of its filing with the clerk is disclosed. That it must be filed, and that this fact must appear upon the face of the record, has been any times decided, but that it must appear from an order-book entry is not required. While an order-book entry of the filing would verify the fact of filing, it is not required, any more than in the filing of a complaint. Those things required to be filed with the clerk are shown to have been filed when the clerk certifies to the fact of filing, or the transcript affirmatively discloses the filing.

Objection is made that the record discloses that all of the evidence given upon the trial was not incorporated in the bill of exceptions, and, therefore, that we should not consider the evidence. In support of this objection, counsel cites two offers, by him made in the lower court, to prove, in blank. The omissions are not of evidence, and the blanks carry the presumption that the offers were never completed. In further support of this objection, counsel cites testimony identifying a map as that of the locality of the accident. It is not there disclosed that the map was introduced in evidence, and its identification, and proof of its correctness, do not establish the introduction of the map in evidence, against the judge's certificate that the bill of exceptions contains all of the evidence.

Questions have been argued orally, and by elaborate briefs, as to the constitutionality of the employer's liability act (Acts 1893, p. 294). The liability of the appellant under said act was probably not in question under two of the three paragraphs of complaint, and was certainly not involved in the ruling upon which we have declared error. It is not the practice, and it may be doubted if it is the privilege, of this court to pass upon the constitutional validity of an act of the

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general assembly, when the case in which that validity is questioned may be correctly decided without passing upon that question. *Henderson v. State*, 137 Ind. 552, and cases cited. The judgment of the lower court is reversed, with instructions to grant a new trial.

EATON

v.

MCINTIRE.

(*Supreme Judicial Court of Maine, March 6, 1896.*)

Railroad Mileage Books.—The conductor has the right to determine from what part or parts of a railroad mileage book coupons shall be taken to pay a passenger's fare.

REPORT from Kennebec county superior court. *Judgment* for defendant.

Harvey D. Eaton, in pro. per.

Edmund F. & Appleton Webb, for defendant.

WALTON, J.—This is an action of trover against a railroad conductor for the alleged conversion of a mileage book. The plaintiff handed his mileage book to the conductor, and requested him to take his fare from the back part of it. The conductor complied with the request in part, and disregarded it in part; that is, he took part of the plaintiff's fare from the back part of the book, and part from the front. The plaintiff claims that he had a right to determine from which part of the book his fare should be taken, and that the act of the conductor in detaching coupons from the front part of the book, contrary to his (the plaintiff's) request, was an unlawful exercise of dominion over the book, and, in law, a conversion of it to the defendant's use.

We do not think this proposition can be sustained. We think it was the right of the conductor to determine from what part or parts of the book he would take the plaintiff's fare. The contract of the parties, annexed to the book, and signed by the plaintiff, expressly provides that the coupons shall be

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detached by the conductor, and we think this fairly implies that the conductor shall have the right to determine from what part or parts of the book they shall be taken. The work of collecting fares must sometimes be performed very rapidly, and to compel conductors to listen to the requests of passengers as to the manner in which the work shall be performed would necessarily be attended with some inconvenience and delay; and, so far as we can discover, with very little, if any, benefit to the passengers. It therefore seems to us that, upon principle, the right to determine from what part or parts of a railroad mileage book a sufficient number of coupons shall be taken to pay a passenger's fare ought to belong to the conductor. The act is his, and it seems to us that, upon principle, the choice should be his. And this conclusion is supported by what has heretofore been customary. The evidence shows, what our own observation confirms, that, ever since these mileage books came into use, the custom has been for the conductor to detach a sufficient number of coupons to pay the passenger's fare from the front part of the book; not always taking the entire number consecutively, but by detaching whole leaves and such fractions of leaves as he deems best calculated to make the computation easy and the removal convenient. And what is customary is generally lawful. Custom makes law. As said by Chief Justice WHITMAN, more than half a century ago, and confirmed by a multitude of cases since that time, "every contract must have an interpretation governed in some measure by the subject-matter to which it relates, and, at the same time, with reference to any known usage connected with it." *Robinson v. Fiske*, 25 Me. 401.

Judgment for defendant.

Struthers v. Philadelphia & D. C. R. Co.

STRUTHERS

v.

PHILADELPHIA & D. C. R. CO.

(*Supreme Court of Pennsylvania, March 9, 1896.*)

Measure of Damages in Condemnation Proceedings.—The measure of damages in condemnation proceedings is the difference in the market or selling value of the property taken, before and after the taking.

Real Estate Experts.—On the question of the value of certain land, one who is an expert in real estate elsewhere, but has no special knowledge of prices in the vicinity of the land in controversy, should not be allowed to testify as an expert.

APPEAL from Delaware county court of common pleas.
Reversed.

John J. Pinkerton, for appellant.

William S. Ellis, E. G. Hamersly, and V. Gilpin Robinson,
for appellee.

WILLIAMS, J.—The several assignments of error appearing on the record in this case raise but two questions, and they are questions about which the profession ought to be in no doubt. One of these is over the measure of damages to which the owner of land is entitled when his land has been entered upon under the right of eminent domain. The other is, what constitutes an expert witness?

The true measure of damages has been held, in a long and unbroken line of cases, to be the difference in the market or selling value of the property entered, before the entry was made, and afterwards. *Railway Co. v. McCloskey*, 110 Pa. St. 436, 23 Am. & Eng. R. Cas. 86; *Railway Co. v. Vance*, 115 Pa. St. 325; *Setzler v. Railroad Co.*, 112 Pa. St. 56, 24 Am. & Eng. R. Cas. 280; *Curtin v. Railroad Co.*, 135 Pa. St. 20, 44 Am. & Eng. R. Cas. 130; *Mahaffey v. Railroad Co.*, 163 Pa. St. 158; *Spring City Gas Light Co. v. Pennsylvania, S. V. R. Co.*, 167 Pa. St. 6. In this case, the plaintiff was allowed

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damages in
condemnation
proceedings.

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to give evidence tending to show that he was the owner of a right of way that was obstructed by the building of the railroad, and that this item of damage amounted to \$1,000. The evidence of the existence of the right of way was very slight, and the learned judge so regarded it, as is evident from his charge. The evidence of its having any practical value to the plaintiff, if he had shown himself entitled to use it, was equally slight. It is true that an "expert witness" had been found who placed its value at \$1,000, but the learned judge took occasion to say, when speaking on this subject to the jury, that he would not sustain a verdict that should adopt the sum of \$1,000 as the value to the plaintiff of the right of way. But he left this evidence to the jury in a manner calculated to leave an erroneous impression on their minds. He said: "There is some evidence that there was a right of way there by immemorial usage; and if you come to the conclusion that there was a right of way there, you may consider its value. If you come to the conclusion that there was an element of damage there, you can allow it." The jury might well understand, from this instruction,—indeed, it is not easy to see how they could reach any other conclusion,—that the right of way, if found to exist, might be separately valued, and added to such other items as they might allow, in order to make up the amount of their verdict. But the jury have no right to allow damages for distinct items, whether estimated by experts or other witnesses, and reach the amount of their verdict in that manner. Their duty is simply to ascertain the loss in the selling value of the property entered, due to the fact of the taking by eminent domain. This loss stands for the measure of damages because it embraces the effect of all the elements of depreciation taken together.

The other question ought to be equally free from difficulty. An expert is a person experienced, trained, skilled in some particular business or subject. An expert witness is one who, because of the possession of knowledge not within ordinary reach, is specially qualified to speak upon the subject to which his attention is called. Thus, a chemist, a physician, a mechanic, an artist, has special knowledge of the things that fall within the range of his studies and his daily practice, and, because of such special knowledge, not within ordinary reach, his testimony

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experts.

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upon a subject relating to his particular line of study or research is regarded as more exact, and entitled to more weight than that of witnesses not possessing the same opportunities for acquiring thorough knowledge of the subject. Many persons may know something about a given question, and be competent as witnesses to tell what they know. A few may have an intimate, an exceptional, knowledge, and be entitled to speak as expert witnesses. Now, the question to which the so-called expert witnesses were called in this case was the value of the plaintiff's land before the location of the defendant's railroad over it, and its value as affected by that location. That they were experts in the value of real estate elsewhere did not give to their testimony the value of expert evidence when they spoke of the plaintiff's property. If they had no knowledge of the prices of land in that neighborhood before and after the location of the railroad, they ought not to be allowed to guess from their knowledge of prices in some other neighborhood, and have such guess left for the consideration of the jury as expert testimony. Sprogle was a witness, but he certainly did not show himself to have knowledge not within ordinary reach on the subject of the value of the plaintiff's land. He had no special or peculiar knowledge of value in that neighborhood. He knew enough about the subject to be entitled to be heard as any other witness might be, but expert knowledge means more than that. It was a mistake, therefore, to treat or submit to the jury his evidence as that of an expert in values in the vicinity in which the plaintiff's land was situated. His evidence should have gone with that of other witnesses who spoke as witnesses simply; or, in the language of the learned judge, found in the bill of exceptions, "I think he can testify, as far as his testimony goes." He might have been an expert in values in Philadelphia or Reading, but he did not show himself to be such as to Delaware county. The knowledge relied on to give the testimony of a witness the value of that of an expert must relate to the subject under investigation. *Spring City Gas Light Co. v. Pennsylvania, S. V. R. Co.*, 167 Pa. St. 6. The judgment is reversed, and a *venire facias de novo* awarded.

Murray v. Lehigh Valley R. Co.

MURRAY

v.

LEHIGH VALLEY R. CO.

(*Supreme Court of Errors of Connecticut, July 19, 1895.*)

Railroad Using Track of Another Company Constitutes the Servants of the Latter Its Agents.—A railroad company which uses for a portion of the way the track of another company, with which it has a contract requiring it, while running its trains on that part of the track, to obey the orders and signals of the other company, is liable for any injuries to its passengers, occasioned by the negligence of the other company's servants, on the track used in common.

APPEAL from New Haven county superior court. *Affirmed.*

George D. Watrous and *Edward G. Buckland*, for appellant.
Tilton E. Doolittle, for appellee.

ANDREWS, C.J.—The controlling question presented by the appeal in this case arises on the charge of the court to the jury. That being disposed of, the other assignments of error become unimportant. And in the charge that question is narrowed to this: Was the court correct in saying to the jury that the servants of the Central Railroad Company, while operating its trains on that portion of its track used in common by that company and this defendant, might, for the purposes of this case, be regarded as the servants of this defendant? A recurrence to the duties which the law imposes on every railroad company as a carrier of passengers will serve to make the answer to this question more distinct.

A railroad corporation, by the contract for a passage over its road, assumes the obligation to exercise the highest practicable degree of human skill to carry the passenger in safety, and undertakes absolutely to protect him against any injury or willful misconduct of its servants in the performance of its contract; and the obligation in these respects continues until the contract is fully performed. *Dwinelle v. Railroad Co.*, 120 N. Y. 117, 44 Am. & Eng. R. Cas. 384. Every carrier of passengers for hire—although not, like a common carrier of

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goods, an insurer against everything but the act of God and the public enemies—is bound to use the utmost care which is consistent with the nature of the business to guard the passenger against all dangers, from whatever source arising, which may reasonably and naturally be expected to occur, in view of all the circumstances, and of the number and character of the persons with whom the passenger will be brought in contact. The carrier must provide safe, sufficient, and suitable vehicles for transportation, and must provide such servants for the management of the same and make all such reasonable arrangements therefor, as the highest care of a prudent man would suggest as necessary to a safe passage. *Hall v. Steamboat Co.*, 13 Conn. 319; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *Flint v. Transportation Co.*, 34 Conn. 554; *Simmons v. Steamboat Co.*, 87 Mass. 361; *Palmeri v. Railway Co.*, 133 N. Y. 261; *Pendleton v. Kinsley*, 3 Cliff. 416, Fed. Cas. No. 10,922. This duty is imposed by law; and this measure for its performance rests upon a railroad corporation to its full extent. A railroad corporation is a carrier of passengers by virtue of the franchise granted to it by its charter,—a franchise intended to be used for the public good. By asking for and receiving the franchise, the corporation comes under the obligation to answer in damages to every one who may be injured by any negligence in the use of the privilege it has so received. And public policy will not permit the corporation to relieve itself from this obligation by any contract with others. A railroad company entering into contract relations with another company, by which the safety of its own passengers may be affected, is held to have made the other company in this respect its own agent. It is held to the exercise of due care for the safety of all persons, while exercising its franchise, whether on its own road or that of another company. This duty was imposed by law when it received its charter, and this duty holds good at all times and in all places. If the company operates its trains over the road of another company, it must see and know that the track is in good and safe condition, and that the trains of the other company are so ordered as not to interfere with the full discharge of its own duty to its own passengers, because such trains would be a danger against which it would be bound to provide. If a railroad company permits another company to run its trains upon its track, it is liable for any want of care of its lessee, and may

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be sued therefor, the same as though the trains were its own. If a railroad company leases its entire road and all its rolling stock to another company, it remains liable for all the laches and neglect of its lessee (except in cases where the lease is approved by the legislature), as fully as if it was itself operating its road; on the theory that the lessee, whether a lessee of a part or of the whole, is the agent of the lessor. *Driscoll v. Railroad Co.*, 65 Conn. 230; *Lakin v. Railroad Co.*, 13 Or. 436, 26 Am. & Eng. R. Cas. 611; *Railway Co. v. Washington*, 86 Va. 629, 43 Am. & Eng. R. Cas. 688; *Whitney v. Railroad Co.*, 44 Me. 362; *Stearns v. Same*, 46 Me. 95, 116; *Wyman v. Railroad Co.*, Id., 162; *Nugent v. Railroad Co.*, 80 Me. 62, 38 Am. & Eng. R. Cas. 52; *Nelson v. Railroad Co.*, 26 Vt. 717, 721; *Clement v. Canfield*, 28 Vt. 302; *McElroy v. Railroad Co.*, 4 Cush. 400; *Railroad Co. v. Barron*, 5 Wall. 90, 104. And on the other hand, if one railroad company runs its trains over a portion of the road of another company, pursuant to a contract whereby it is agreed that its trains, while on such leased road, shall be under the control and direction of the servants of the lessor company, then the servants of the lessor company at such place, and for the time being, are the servants of the lessee company, and it will be liable for any injury to a passenger caused by the negligent act of such servant, as though he was its own employee.

The case of *Railway Co. v. Peyton*, 106 Ill. 534, 540, 18 Am. & Eng. R. Cas. 1, is an application of this rule. That was a case almost exactly like the one now before us. That case was an appeal. In the lower court the appellee had recovered judgment. It was shown that the appellant, by a lease of a portion of the road of the Chicago & Western Indiana Railroad Company, was permitted to run its trains over a portion of the track of the latter company near to a station, to and from which its trains ran and departed. By the terms of the lease, the lessor company had the control of the passenger train of the appellant while on that portion of track, and its servants directed and controlled the trains of the appellant in coming to and going from that station. The appellee was injured while a passenger on a train of the appellant, by the negligence of the yard master of the lessor company. The court said: "The controlling question of the case * * * is whether the appellant is freed from liability by placing, by the lease or agreement, its employees and

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trains, at the place where the injury occurred, under the control of the road master of the other road. Appellant did so as a matter of interest or choice, and not from overpowering necessity. When the charter was granted, the corporation became a common carrier of persons and property, and the law imposed the duty of common carrier, with all the liabilities incident to the occupation, and the responsibility was assumed by the corporation, and imposed on it by law. Nor can the corporation exonerate itself from the duty and responsibility by contract with others, nor in any wise escape or free itself from the liability, unless released by the general assembly. Appellant voluntarily placed its engine and cars, at that place, under the control and direction of the employees of the other road; and for the time being, and for that purpose, the road master of the other road became the servant of the appellant. The engine and train belonged to the appellant. The engine driver, the fireman, the conductor, and the brakeman on board of the train were its servants, under its control; and the yard master, under the agreement, *pro hac vice*, for the time and place, was its servant. Had the agreement not been made, he would not have controlled the starting of the train. Appellant, by the agreement, authorized him to act as its yard master, and to act for it at that time and place, and it must be held responsible for his acts. The company cannot escape by saying he was employed and controlled by the other road. He was, as we have seen, the servant of the appellant, to the full extent he acted, in this case." *Railway Co. v. Keighron*, 74 Pa. St. 316; *Vary v. Railroad Co.*, 42 Iowa 246; *Laugher v. Pointer*, 5 Barn. & C. 547, 559; *Eaton v. Railroad Co.*, 11 Allen 500; *Abbott v. Railroad Co.*, 80 N. Y. 27; *Railway Co. v. Curl*, 28 Kan. 622; *Balsley v. Railroad Co.*, 119 Ill. 68, 25 Am. & Eng. R. Cas. 497; *Railway Co. v. Timmons*, 51 Ark. 459, 40 Am. & Eng. R. Cas. 698.

The plaintiff was a passenger on the railroad of the defendant from Allentown to Jersey City. He was entitled to be carried in safety, and it was the duty of the defendant to so carry him the entire journey, whether it carried him over a track owned by itself or over a track hired of another. If the defendant, for its own convenience, chose to carry him a part of the journey over a hired track, it was its duty to make the track hired as safe as the track owned. If, by reason of being

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carried on a hired track, the plaintiff was exposed to a danger from which he would have been free had the track been owned by the defendant, and suffered injury therefrom, then for such injury the defendant is liable to him. *Pierce*, R. R. 283. The case shows that, in the use of the portion of track owned by the Central Railroad Company, this defendant was bound by its agreement with that company to obey the orders and signals given by the servants of that company. The case shows, then, that to the extent of that agreement, and for the purposes included in it, this defendant had, by the terms of that agreement, made the servants of that company its own servants; and as the case further shows that the train on which the plaintiff was a passenger was upon this portion of track, and was being operated in obedience to the orders of those persons who, by the agreement, were the servants of this defendant, we think the charge was fully justified.

The verdict having established that the danger of collision to which the train of the defendant was exposed was caused by the negligence of the defendant's own servants, the several rulings in respect to the admission of testimony become immaterial. This fact being settled, it matters not whether the men on the trains were friendly or unfriendly to one another, nor whether the train of the defendant was behind time, or the train of the Central Company ahead of time, nor what any person on the rear train may have said, or omitted to say.

The motion for a new trial on the ground that the verdict is against the evidence must be denied. In considering the evidence, the jury was bound to accept the charge of the court as correct; and, in the light of the charge, there was abundant evidence to support the verdict. Indeed, the jury could not well have reached a different result. There is no error. A new trial is denied.

FENN and HAMERSLEY, JJ., concurred.

BALDWIN, J. (*dissenting*).—If the apparent danger of collision, which induced the plaintiff to jump from the car, was due to the negligence of the Lehigh Valley Railroad Company, or its servants, there was a good cause of action against it; but there was none, in my opinion, if the accident was due to the willful act of a servant of the Central Railroad Company, outside of the scope of his employment. The Lehigh

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Valley Railroad Company claimed, upon the trial, that it was due to such a willful act, on the part of those in control of the locomotive of the Central Railroad Company. In support of this claim, it offered testimony from its division superintendent that, on the day in question, there was a strike on its road, and its trains were being operated by nonunion men, while the Central Railroad trains were being run by union men; that there was ill feeling on the part of these union men towards the nonunion men; that, in consequence thereof, the accident occurred which resulted in the damage to the plaintiff for which the suit was brought; and that a certain remark was heard by John M. Robinson, the rear brakeman of the car on which the plaintiff was, from a person on the engine of the Central Railroad Company, "at the time of the approach and stopping of said engine, threatening a collision." The exclusion of all this testimony constitutes, in my opinion, sufficient ground for maintaining the appeal.

The finding shows that the plaintiff's evidence tended to prove that a train of the Central Railroad, upon a dark and foggy night, was pushed up within 10 or 15 feet of the car in which he was riding, and was apparently about to crash into it, when he jumped off to save his life. The Lehigh Valley Railroad Company, in explanation of this dangerously near approach to its train of the train behind it, offered to show that it occurred in consequence of unfriendly feeling on the part of those controlling the Central Railroad train towards those controlling the train ahead of it. Such a consequence, from such a cause, could only have been occasioned by a willful and wrongful abuse of the power intrusted by the Central Railroad Company to its servants for managing the course and speed of the train in question. If the union men on the Central Railroad engine were apparently intending to use it as a catapult, or were threatening to do so, in order to intimidate the nonunion men in charge of the Lehigh Valley Railroad train, it was a malicious tort, so far outside the scope of their employment as to exonerate even their own employer from any liability for such damage as might be occasioned. *Crocker v. Railroad Co.*, 24 Conn. 249, 265. It would be "an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders." *Pierce, R. R.* 279. "If the servant, under guise and cover of executing his master's orders and exerting the authority

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conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purpose, does an injury, then the master is not liable." *Cohen v. Railroad Co.*, 69 N. Y. 170, 174.

The trial court has found that "no testimony was offered to prove that any person in control of the Central Railroad train was, in fact, actuated in this affair by any feeling of hostility, or did any intentional act which sprung from that motive." The evidence, however, was at the same time certified up at length by the court, for our consideration upon the motion for a new trial, on the ground that the verdict was against the evidence. In the evidence thus certified appears that of John M. Robinson, the rear brakeman of the car upon which the plaintiff was riding. He testified that a stop signal was given by the Lehigh Valley Railroad train, the customary answer to which was two whistles; that the engineer of the Central Railroad train did not give this answer, but continued right on, and, as he neared them, blew a long, shrill whistle; and that some one on the latter's engine, just as it finally slackened speed, a short distance behind the rear car of the train ahead, shouted to the witness, "You scab sons of bitches!" ("scab" being a word of reproach used by union men in referring to nonunion men). The court ruled that these words might have been a mere expression of vexation at finding the Lehigh Valley train on the track, and behind time, and struck out the testimony regarding it. The only reference to the particular nature of this testimony in the finding prepared for the purposes of the appeal is that which I have previously mentioned; and whether in that finding the words "threatening a collision" can be understood as characterizing the remark which was excluded is quite doubtful. It might with perhaps more propriety be read as referring to the engine, or the approach and stopping of the engine. Be this as it may, both parties have argued this exception as if the remark in question had been duly incorporated in the finding, and it would seem to me a sacrifice of substance to form to disregard it, in view of the passage which I have quoted from the finding, to the effect that no testimony was offered to prove any intentional act of malice on the part of the union men in charge of the Central Railroad train. The reason given by the trial court for ordering Robinson's testimony about this remark to be stricken out shows that that order

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was based on the opinion that, as the words used might have indicated mere vexation, they ought not to be allowed to go to the jury as evidence of hostility or hostile acts. In my judgment, this ruling proceeded upon a mistaken view of the law which, under the special circumstances of this case, may and should be taken into account by us in determining the true meaning and effect of the finding. *Styles v. Tyler*, 64 Conn. 432, 439. What this language, heard by Robinson, meant, what disposition it evinced, who said it, and what light it threw on the accompanying acts, were all questions, it seems to me, proper for the consideration of the jury. *Ritchie v. Waller*, 63 Conn. 155.

The act of running one train almost into another, which was ahead of it on the same track, in disregard of the customary signals, was one of an unusual nature. The circumstances attendant on the strike seem to offer a possible, if not a probable, explanation. Coupled with the insulting and indecent remark hurled after the receding train, they might well have led the jury to conclude that the threatened collision was in the nature of a wanton and malicious assault by servants of the Central Railroad Company, not in their master's service, nor in the execution of any authority which had been confided to them. An act of doubtful meaning can often be explained by the word that went with it, or the circumstances under which it was done. I think that the passage above quoted from the finding, to the effect that no evidence was offered of hostile acts, should be read as if it stated that none was offered unless the testimony of the division superintendent and the rear brakeman could be considered such; and, therefore, that a new trial should be granted for errors in the exclusion of that testimony.

I concur with the court in the opinion that, under the testimony admitted and instructions given, the verdict was not against the evidence in the cause. I dissent from the opinion so far as it holds that the verdict cures any errors in excluding testimony. The jury, upon the evidence before them, were called upon to consider no other question than that as to whether the conduct of the Lehigh Valley Railroad Company or the acts of those in charge of the second train were negligent or not. They have found these acts to have been negligent; but, had they had the excluded evidence before them, they might have attributed to them a different character.

Settoon v. Texas & Pac. R. Co.

APPEAL from Judicial District Court, Parish of Iberville.
Reversed.

Howe, Spencer & Cocke, and *L. De Poorter*, for appellant.
Hébert & Hébert, for appellees.

MCENERY, J.—The plaintiffs, parents of Henry N. Settoon, brought this suit for damages against the defendant corporation for the death of their son, who was killed by its cars at the town of White Castle. The defense is such as is usually urged in such cases. There was judgment for plaintiffs in the sum of \$12,500, and the defendant appealed.

In front of and alongside of the depot of the railroad there is a switch track, and beyond this the main track. Between the two tracks the company filled in with cinders for the purpose of affording a dry surface for its passengers, who get off and on the trains at this point, and also for the convenience of its employees. It is in evidence that people in the vicinity used this cinder walk, but we do not think that it is shown that there was an implied invitation to the public to use it, any more than its main track or the switch track. The fact of the road having made the space between the two tracks dry by placing cinders on it, in itself, is not an invitation to the public to use it. The road might fill in the spaces between the ties on the main track with gravel, yet this would not be an implied invitation to the traveling public to use the road-bed as a highway. In the vicinity of the depot there is a store, and from this, leading to the cinder walk, there is a pathway. From the store, leading to Bowie street, back of the depot, and towards the town, there is a driveway, and alongside of this a plank sidewalk. Through and over the cinder walk is the shortest way, probably, to Bowie street; but the death of the plaintiff's son proves it to be the more dangerous. In the early part of the night, about 8 o'clock, plaintiff's son was at the store, called the "Company's Store," or "Romantus T. Hart's Store." It does not appear that the railroad company is in any way interested in this store. The plaintiff's son, accompanied by one Gonzales, left the store at the hour mentioned, took the small footpath, crossed the switch track, and went on the cinder walk, intending to reach Bowie street. They had not proceeded far before they were both struck by a pole, extending over the cinder walk, which was used by the company in moving box

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cars for the purpose of making up a freight train. Gonzales escaped serious injury, and was thrown down. Plaintiffs' son was thrown on the switch track, his thighs crushed, and he died in about three hours. The defendant company was engaged in its proper and legitimate calling in making up a freight train. The switch had been placed there for that purpose, and we are not informed that any other more convenient and safe method could have been employed. The plaintiffs' son knew what the switch was there for, and he knew the mode employed by defendant in making up its train. Conceding, therefore, that he went on the cinder walk by implied consent of the defendant, the law is uniform in its expression that, if one avails himself of the license, he does so subject to all incidental perils. But the trespasser, or one who avails himself of an implied invitation to go on premises, is not without a remedy, if the injury inflicted was wantonly and maliciously done, or if it could have been avoided in time by the use of vigilance. It is not to be expected, however, that railroad companies will patrol and police their tracks for the purpose of warning the public of danger. The tracks are silent but potent signals of danger, and to the cautious the cinder walk would have warned of impending danger, particularly on a dark night, such a one as prevailed when plaintiffs' son was injured.

Assumption of
risks in going
upon premises
of another.

The evidence, we think, is sufficient to show that the plaintiffs' son was warned of danger. The witness Gonzales, who accompanied plaintiffs' son, says: "He and I were walking from the company's store, and as we walked upon the railroad there was a train backing down, and as we got about 150 feet above the switch, we were knocked over with the pole that they were backing with. They were backing these boxes on the main line to switch them out. The pole struck us, and knocked us over the switch, and he got run over, and died about three hours afterwards." And, further on in his testimony, he says the night was dark, and that he could not see, when he got on the track, the character of the premises, but he could see that the boxes on the main line were moving, but he thought it was another train on the main line. The sight of these boxes moving ought to have been a sufficient warning to the plaintiffs' son that there was imminent danger on going on the track, or on the cinder walk between

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the two tracks. The defendant company cannot be held liable for deceased's want of judgment, or for his mistakes. He had not been placed by the company in a position of peril when he was suddenly called upon to make an election as to the best mode of escape, but he was where he had voluntarily placed himself, and where he had ample time, by reflection, to retreat from the danger point. The brakemen engaged in making up the train and moving the cars by means of the pole were provided with lights used as signals. One of the brakemen saw the witness Gonzales and plaintiffs' son when they approached the switch track, and before they got on it for the purpose of crossing to the cinder walk, and halloed to them to stop. They paid no attention to the warning. Probably they did not hear the warning, but the witness' statement of the distance is such that they ought to have heard. Plaintiffs' counsel, while admitting that the witness gave the warning, contend that it was at such a distance they could not hear, because of the noise of the moving train. This noise ought to have been a warning to them, independent of the warning given by the brakeman. But, as the witness saw them, and as he had a light, and the switch engine bell was ringing, it is reasonable to suppose that, if plaintiffs' son had been exercising the slightest prudence, he would have seen the brakemen, and heard the bells, and at once ought to have known that a train was being made up, and that there was danger in walking in the space between the tracks.

There is a plank walk from the store to Bowie street, to which point plaintiffs' son was going. It was the less dangerous route. Plaintiffs' son chose the more dangerous one, and he was responsible for the selection, taking the latter with all of its attendant and incidental risks. The facts in this case bring it within the ruling of *Bollinger v. Railway Co.*, 47 La. Ann. 722, and *Burbank v. Railroad Co.*, 42 La. Ann. 1156, 45 Am. & Eng. R. Cas. 593. It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now ordered that plaintiffs' demand be rejected, at their costs.

Negligence to
select the more
dangerous of
two avenues of
travel.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission

CINCINNATI, N. O. & T. P. R. Co. *et al.* v. INTERSTATE
COMMERCE COMMISSION.

INTERSTATE COMMERCE COMMISSION v. CINCINNATI, N. O.
& T. P. R. Co. *et al.*

(162 U. S. 184.)

When Railroad Situated Wholly within a State is Subject to Interstate Commerce Act.—When a railroad company whose line is situated entirely within a state, enters into the carriage of foreign freight, by agreeing to receive goods under through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, and accordingly is amenable to the Interstate Commerce Act.

Railroad Subject to Control of Interstate Commerce Commission Cannot Limit that Control.—A railroad within a state which has elected to enter into the carriage of interstate freights, and has thus subjected itself to the control of the Interstate Commerce Commission, cannot limit that control, in respect to foreign traffic, to certain points on its road, and exclude other points.

Evidence before Interstate Commission.—In proceedings before the Interstate Commerce Commission railroad companies should not withhold their evidence, with a view to producing it subsequently in court.

Interstate Commerce Commission has no Power to Fix Rates.—The Interstate Commerce Act does not, expressly or by implication, confer on the Interstate Commerce Commission the power to fix rates.

APPEALS from the United States circuit court of appeals for the Fifth circuit. *Affirmed.*

On October 18, 1889, the James & Mayer Buggy Company, a corporation of the state of Ohio, and doing business at Cincinnati, filed a complaint before the interstate commerce commission against the Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, alleging that said defendants were common carriers “under a common control, management, or arrangement for continuous carriage or shipment,” and charged the same rate for transporting vehicles shipped by the complainants from Cincinnati, whether shipped to Atlanta, Ga., a distance of about 474 miles, or to Augusta, Ga., a distance of 645 miles, and charged 30 cents per 100 pounds more on such vehicles

Case stated.

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shipped to Social Circle, Ga., than when shipped to either Atlanta or Augusta.

The Cincinnati, New Orleans & Texas Pacific Railway extends from Cincinnati to Chattanooga, Tenn. The road of the Western & Atlantic Railroad Company begins at Chattanooga and extends to Atlanta, and that of the Georgia begins at Atlanta and ends at Augusta. These respondents filed answers, from which, and from the allegations of the complaint, it appeared that the complainants shipped their goods, at first-class rates, by through bills of lading, from Cincinnati to Atlanta, to Social Circle, and to Augusta; that through rates of \$1.07 per 100 pounds were charged to both Atlanta and to Augusta, of which the Cincinnati, New Orleans & Texas Pacific Railway Company received 55.7 cents; the Western & Atlantic, 22.9 cents; and the Georgia Railroad Company, 28.4 cents. Social Circle is a local station on the Georgia Railroad, 52 miles east of Atlanta, and 119 miles west of Augusta. When goods were shipped to Social Circle the complainants had to pay \$1.37 per 100 pounds, of which 75.9 cents went to the Cincinnati, New Orleans & Texas Pacific Company, 31.1 to the Western & Atlantic, and 30 cents to the Georgia,—the said amount of 30 cents per 100 pounds being the local charge made by the Georgia Company on similar freight carried by it from Atlanta to Social Circle.

The complainants contended that, as the rate to Augusta was \$1.07 per 100 pounds, that charge was excessive when made against similar freight carried to Atlanta, which is 171 miles nearer to the point of shipment. They also contended that the charge of \$1.37 to Social Circle was excessive and undue, as the defendants carried similar freight for \$1.07 to Augusta, a greater distance by 119 miles.

The respondents claimed that they were justified in charging the same rate to Augusta as to Atlanta, because the former was a competitive point; and, as to the rates to Social Circle, they claimed that the goods were not carried to that point under a common control, management, or arrangement for continuous carriage or shipment, but that the additional 30 cents per 100 pounds was the local charge for similar service by the Georgia Company, and that, therefore, the case of goods carried to Social Circle was not within the provisions of the act to regulate commerce.

The controversy before the commission resulted in an order

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requiring the defendants to cease and desist from making any greater charge in the aggregate on buggies, carriages, and other freight of the first class, carried in less than car loads from Cincinnati to Social Circle, than they charged on such freight from Cincinnati to Augusta, and to cease and desist from making any charge for the transportation of such freight from Cincinnati to Atlanta in excess of \$1 per 100 pounds. This order was dated June 29, 1891, and was to operate from July 20, 1891.

The defendants having refused to obey this order, and failed to alter or modify their charges, the interstate commerce commission filed a bill or petition in the circuit court of the United States for the Northern district of Georgia, seeking to enforce the said order.

To this bill the Louisville & Nashville Railroad Company and the Central Railroad & Banking Company of Georgia filed a joint and several answer, in which they alleged that the said companies jointly operated the railroad from Atlanta to Augusta as assignees of one William Wadley, to whom that road had been previously leased by the Georgia Railroad & Banking Company, a corporation of the state of Georgia, and that they so operated said railroad under the adopted name of the "Georgia Railroad Company," but that there was no such corporation as the "Georgia Railroad Company." This answer further denied the allegation of the petition of the commission in so far as they charged that rates charged by them were undue or excessive, or in disregard of the provisions of the act to regulate commerce.

An answer was filed by the Cincinnati, New Orleans & Texas Pacific Railway Company, traversing the allegations of the bill, so far as it alleged the charging of undue or unreasonable rates to Atlanta or to Social Circle. The Western & Atlantic Railroad Company set up in its answer that it had no existence as a corporation at the time of the proceedings before the interstate commerce commission, and had no connection with the matters therein complained of, and therefore prayed that, as against it, the petition of the commission should be dismissed. This position was subsequently abandoned.

Under the issues thus formed a considerable amount of testimony was taken. The cause came on to be heard, was argued by counsel, and thereupon, on June 5, 1893, the court, holding that the matters of equity alleged in the bill were

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fully denied in the answers, and were not sustained by the proof, decreed that the bill be dismissed. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 56 Fed. Rep. 925, 54 Am. & Eng. R. Cas. 365.

From this decree an appeal was taken to the United States circuit court of appeals for the Fifth circuit, and was there so proceeded in that on May 27, 1894, the decree of the circuit court was reversed, and the cause was remanded to that court with instructions to enter a decree in favor of the interstate commerce commission and against the defendants; commanding the latter to cease and desist from making any greater charge, in the aggregate, on buggies, carriages, and on other freight of the first class carried in less than car loads, from Cincinnati to Social Circle, than they charge on such freight from Cincinnati to Augusta. 9 C. C. A. 689.

Appeals were taken from this decree, and errors assigned, respectively, by the defendants and by the commission.

N. J. Hammond and *Geo. F. Edmunds*, for the interstate commerce commission.

Ed. Baxter, for Cincinnati, N. O. & T. P. Ry. Co. and others.

Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

The investigation before the interstate commerce commission resulted in an order in the following terms:

“ It is ordered and adjudged that the defendants, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, do, upon and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater compensation, in the aggregate, for the transportation in less than car loads of buggies, carriages, and other articles classified by them as freight of first class, for the shorter distance over the line formed by their several railroads from Cincinnati, in the state of Ohio, to Social Circle, in the state of Georgia, than they charge or receive for the transportation of said articles in less than car loads for the longer distance over the same line from Cincinnati aforesaid to Augusta, in the state of Georgia, and that the said defendants, the Cincinnati, New Orleans & Texas Pacific Railway Company, do also, from and after the 20th day of July, 1891, wholly cease and

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desist from charging or receiving any greater aggregate compensation for the transportation of buggies, carriages, and other first-class articles, in less than car loads, from Cincinnati aforesaid to Atlanta, in the state of Georgia, than one dollar per hundred pounds."

The decree of the circuit court of appeals, omitting unimportant details, was as follows:

"It is ordered, adjudged, and decreed * * * that this cause be remanded to the circuit court, with instructions to enter a decree in favor of the complainant, the interstate commerce commission, and against the defendants, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, commanding and restraining the said defendants, their officers, servants, and attorneys, to cease and desist from making any greater charge, in the aggregate, on buggies, carriages, and on all other freight of the first class carried in less than car loads from Cincinnati to Social Circle, than they charge on such freight from Cincinnati to Augusta; that they so desist and refrain within five days after the entry of the decree; and in case they, or any of them, shall fail to obey said order, condemning the said defendants, and each of them, to pay one hundred dollars a day for every day thereafter they shall so fail; and denying the relief prayed for in relation to charges on like freight from Cincinnati to Atlanta."

It will be observed that in its said decree the circuit court of appeals adopted that portion of the order of the commission which commanded the defendants to make no greater charge on freight carried to Social Circle than on like freight carried to Augusta, and disapproved and annulled that portion which commanded the Cincinnati, New Orleans & Texas Pacific Railway Company, and the Western & Atlantic Railroad Company to desist from charging for the transportation of freight of like character from Cincinnati to Atlanta more than \$1 per 100 pounds.

The railroad companies, in their appeal, complain of the decree of the circuit court of appeals in so far as it affirmed that portion of the order of the commission which affected the rates charged to Social Circle. The commission, in its appeal, complains of the decree, in that it denies the relief prayed for in relation to charges on freight from Cincinnati to Atlanta.

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The first question that we have to consider is whether the defendants, in transporting property from Cincinnati to Social Circle, are engaged in such transportation "under a common control, management, or arrangement for a continuous carriage or shipment," within the meaning of that language, as used in the act to regulate commerce.

We do not understand the defendants to contend that the arrangement whereby they carry commodities from Cincinnati to Atlanta and to Augusta at through rates which differ in the aggregate from the aggregate of the local rates between the same points, and which through rates are apportioned between them in such a way that each receives a less sum than their respective local rates, does not bring them within the provisions of the statute. What they do claim is that, as the charge to Social Circle, being \$1.37 per 100 pounds, is made up of a joint rate between Cincinnati and Atlanta, amounting to \$1.07 per 100 pounds, and 30 cents between Atlanta and Social Circle, and as the \$1.07 for carrying the goods to Atlanta is divided between the Cincinnati, New Orleans & Texas Pacific and the Western & Atlantic, 75.9 cents to the former and 31.1 cents to the latter, and the remaining 30 cents, being the amount of the regular local rate, goes to the Georgia company, such a method of carrying freight from Cincinnati to Social Circle, and of apportioning the money earned, is not a transportation of property between those points "under a common control, management, or arrangement, for a continuous carriage or shipment."

Put in another way, the argument is that, as the Georgia Railroad Company is a corporation of the state of Georgia, and as its road lies wholly within that state, and as it exacts and receives its regular local rate for the transportation to Social Circle, such company is not, as to freight so carried, within the scope of the act of congress.

It is, no doubt, true that, under the very terms of the act, its provisions do not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, not shipped to or from a foreign country from or to any state or territory.

In the answer filed by the so-called "Georgia Railroad Company" in the proceedings before the commission, there was the following allegation: "This respondent says that while no arrangement exists for a through bill of lading from

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Cincinnati to Social Circle, as a matter of fact the shipment from Cincinnati to Social Circle by the petitioner was made on a through bill of lading, the rate of which was fixed by adding this respondent's local rate from Atlanta to Social Circle to the through rate from Cincinnati to Atlanta."

The answer of the Louisville & Nashville Railroad Company and Central Railroad & Banking Company of Georgia, which companies, as operating the Georgia railroads, were sued by the name of the "Georgia Railroad Company," in the circuit court of the United States, contained the following statement:

"So far as these respondents are concerned, they will state that on July 3, 1891, E. R. Dorsey, general freight agent of said Georgia Railroad Company, issued a circular to its connections, earnestly requesting them that thereafter, in issuing bills of lading to local stations on the Georgia Railroad, no rates be inserted east of Atlanta, except to Athens, Gainesville, Washington, Milledgeville, Augusta, or points beyond. Neither before nor since the date of said circular have these respondents, operating said Georgia Railroad, been in any way parties to such through rates, if any, as may have been quoted, from Cincinnati or other Western points to any of the strictly local stations on said Georgia Railroad. The stations excepted in said circular are not strictly local stations. Both before and since the date of said circular respondents have received at Atlanta east-bound freight destined to strictly local stations on the Georgia Railroad, and have charged full local rates to such stations, said rates being such as they were authorized to charge by the Georgia Railroad commission. Said rates are reasonably low, and are charged to all persons alike, without discrimination."

Upon this part of the case the conclusion of the circuit court was that the traffic from Cincinnati to Social Circle, in issue as to the Georgia Railroad Company, was local, and that that company was not, on the facts presented, made a party to a joint or common arrangement such as make the traffic to Social Circle subject to the control of the interstate commerce commission.

We are unable to accept this conclusion. It may be true that the Georgia Railroad Company, as a corporation of the state of Georgia, and whose entire road is within that state, may not be legally compelled to submit itself to the provi-

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sions of the act of congress, even when carrying, between points in Georgia, freight that has been brought from another state. It may be that if, in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time, and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the state of Georgia. But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the federal act, in respect to such interstate commerce. We do not perceive that the Georgia Railroad Company escaped from the supervision of the commission by requesting the foreign companies not to name or fix any rates for that part of the transportation which took place in the state of Georgia when the goods were shipped to local points on its road. It still left its arrangement to stand with respect to its terminus at Augusta and to other designated points. Having elected to enter into the carriage of interstate freights, and thus subjected itself to the control of the commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road, and exclude other points.

The circuit court sought to fortify its position in this regard by citing the opinion of Mr. Justice BREWER in the case of Railway Co. v. Osborne, 52 Fed. Rep. 912, when that case was before the United States circuit court of appeals for the Eighth circuit. It is quite true that the opinion was expressed that a railroad company incorporated by and doing business wholly within one state cannot be compelled to agree to a common control, management, or arrangement with connecting companies, and thus be deprived of its rights and powers as to rates on its own road. It was also said that it did not

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follow that, even if such a state corporation did agree to form a continuous line for carrying foreign freight at a through rate, it was thereby prevented from charging its ordinary local rates for domestic traffic originating within the state.

Thus understood, there is nothing in that case which we need disagree with, in disapproving the circuit court's view in the present case. All we wish to be understood to hold is that when goods are shipped under a through bill of lading from a point in one state to a point in another, and when such goods are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment, within the meaning of the act to regulate commerce. When we speak of a "through bill of lading," we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested.

Subject, then, as we hold the Georgia Railroad Company is, under the facts found, to the provisions of the act to regulate commerce, in respect to its interstate freight, it follows, as we think, that it was within the jurisdiction of the commission to consider whether the said company, in charging a higher rate for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, was or was not transporting property, in transit between states, under "substantially similar circumstances and conditions."

We do not say that under no circumstances and conditions would it be lawful, when engaged in the transportation of foreign freight, for a carrier to charge more for a shorter than a longer distance on its own line; but it is for the tribunal appointed to enforce the provisions of the statute, whether the commission or the court, to consider whether the existing circumstances and conditions were or were not substantially similar.

It has been forcibly argued that in the present case the commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the commission, whose conclusions have been accepted and approved by the

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circuit court of appeals, and we find nothing in the record to make it our duty to draw a different conclusion.

We understand the record as disclosing that the commission, in view of the circumstances and conditions in which the defendants were operating, did not disturb the rates agreed upon, whereby the same charge was made to Augusta as to Atlanta,—a less distant point. Some observations made by the commission, in its report, on the nature of the circumstances and conditions which would justify a greater charge for the shorter distance, gave occasion for an interesting discussion by the respective counsel. But it is not necessary for us, in the present case, to express any opinion on a subject so full of difficulty.

These views lead to an affirmance of the decree of the circuit court of appeals, in so far as the appeal of the defendant companies is concerned, and we are brought to a consideration of the appeal by the interstate commerce commission.

That appeal presents the question whether the circuit court of appeals erred in its holding in respect to the action of the interstate commerce commission, in fixing a maximum rate of charges for the transportation of freight of the first class in less than car loads from Cincinnati to Atlanta.

This question may be regarded as twofold, and is so presented in the assignment of error filed on behalf of the commission, namely: Did the court err in not holding that in point of law the interstate commerce commission had power to fix a maximum rate; and, if such power existed, did the court err in not holding that the evidence justified the rate fixed by the commission, and not decreeing accordingly?

It is stated by the commission, in its report, that "the only testimony offered or heard as to the reasonableness of the rate to Atlanta in question was that of the vice-president of the Cincinnati, New Orleans & Texas Pacific Company, whose deposition was taken at the instance of the company." And in acting upon the subject the commission say:

"This statement or estimate of the rate from Cincinnati to Atlanta (\$1.01 per hundred pounds in less than car loads), we believe, is fully as high as it may reasonably be, if not higher than it should be; but, without more thorough investigation than it is now practicable to make, we do not feel

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justified in determining upon a more moderate rate than \$1 per hundred pounds of first-class freight in less than car loads. The rate of this freight from Cincinnati to Birmingham, Alabama, is 89 cents, as compared with \$1.07 to Atlanta, the distances being substantially the same. There is apparently nothing in the nature and character of the service to justify such difference, or in fact to warrant any substantial variance in the Atlanta and Birmingham rate from Cincinnati."

But when the commission filed its petition in the circuit court of the United States, seeking to enforce compliance with the rate of \$1 per 100 pounds, as fixed by the commission, the railroad companies, in their answers, alleged that "the rate charged to Atlanta, namely, \$1.07 per hundred pounds, was fixed by active competition between various transportation lines, and was reasonably low."

Under this issue evidence was taken, and we learn from the opinion of the circuit that, as to the rate to Birmingham, there was evidence before the court which evidently was not before the commission, namely, that the rate from Cincinnati to Birmingham, which seems previously to have been \$1.08, was forced down to 89 cents by the building of the Kansas City, Memphis & Birmingham Railroad, which new road caused the establishment of a rate of 75 cents from Memphis to Birmingham, and, by reason of water route to the Northwest, such competition was brought about that the present rate of 89 cents from Cincinnati to Birmingham was the result.

Without stating the reasoning of the circuit court, which will be found in the report of the case in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 56 Fed. Rep. 925, 54 Am. & Eng. R. Cas. 365, the conclusion reached was that the evidence offered in that court was sufficient to overcome any *prima facie* case that may have been made by the findings of the commission, and that the rate complained of was not unreasonable.

As already stated, the circuit court of appeals adopted the views of the circuit court in respect to the reasonableness of the rate charged on first-class freight carried on defendants' line from Cincinnati to Atlanta; and, as both courts found the existing rate to have been reasonable, we do not feel disposed to review their finding on that matter of fact.

We think this a proper occasion to express disapproval of

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such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the commission, and first adduce it in the circuit court. The commission is an administrative board, and the courts are only to be resorted to when the commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the commission have been disregarded. The theory of the act evidently is, as shown by the provision, that the findings of the commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the commission, but that the purposes of the act call for a full inquiry by the commission into all the circumstances and conditions pertinent to the questions involved.

Whether congress intended to confer upon the interstate commerce commission the power to itself fix rates was mooted in the courts below, and is discussed in the briefs of counsel.

We do not find any provision of the act that expressly, or by necessary implication, confers such a power.

It is argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable.

We prefer to adopt the view expressed by the late Justice JACKSON, when circuit judge, in the case of Interstate Commerce Commission v. Baltimore & O. R. Co., 43 Fed. Rep. 37, and whose judgment was affirmed by this court (145 U. S. 263, 49 Am. & Eng. R. Cas. 243):

“Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the

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act to regulate commerce leaves common carriers as they were at the common law,—free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.”

The decree of the circuit court of appeals is affirmed.

INTERSTATE COMMERCE COMMISSION

v.

NORTHEASTERN R. CO. *et al.*

(*United States Circuit Court, District of South Carolina, April 30, 1896.*)

Authority of Interstate Commerce Commission to Institute Proceedings to Enforce Its Orders.—The sole authority of the Interstate Commerce Commission to institute proceedings in the United States Circuit Court to enforce its orders is derived from the act of Congress approved March 2, 1887, and in the exercise of such authority it is bound by, and must confine itself within, the terms of that statute.

Same.—Said act approved March 2, 1887, authorizes a resort by the Commission to the United States Circuit Court only in case of the violation of, or neglect, or refusal to obey or perform, a lawful order or requirement of the commission.

Power of Interstate Commerce Commission to Fix Rates.—The Interstate Commerce Commission is not warranted by the act of Congress to fix rates.*

Wm. Perry Murphy, U. S. Atty., *Asher D. Cohen*, and *Geo. S. Legare*, for complainant.

H. W. Massey and *Smythe, Lee & Frost*, for defendants.

SIMONTON, Circuit Judge.—This case comes up upon a motion to dismiss the bill. The Truck Farmers' Association, of Charleston, and others engaged in the same line of business filed their complaints with the interstate commerce commission against the railroad companies named in the caption. The complaints were that the charge of freight on vegetables and other truck between Charleston and New York and other

* Head notes approved by Judge SIMONTON.

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Northern markets was unreasonable, and so unlawful. The commission, having given due notice to the carriers complained of, entered into a long, laborious, and careful examination of the charges, and, after deliberation upon the voluminous testimony produced before them, filed in writing their findings of fact and their conclusions thereon. They formulated their conclusions in the following final judgment and order:

“ Ordered and adjudged that the defendants [naming them], and each of them, do, within ten days after service of this order, wholly cease and desist and thenceforth abstain from charging or receiving any greater compensation in the aggregate for the transportation from Charleston, in the state of South Carolina, to Jersey City, in the state of New Jersey, of the following named and described commodities, whether shipped to New York, N. Y., and delivered to consignees at Jersey City, or shipped to Jersey City, than is hereinafter set forth as follows, to wit: (1) Six cents per quart, \$1.92 per crate of 32 quarts, or \$3.84 per 100 pounds, as the total charge for the transportation of, including cost of refrigeration en route, and all services incident to such transportation of, strawberries from Charleston aforesaid to Jersey City aforesaid. (2) Fifty-nine and one-half cents per standard barrel or barrel crate for the transportation of apples, onions, turnips, squash, or cymling, or egg plant, from Charleston aforesaid to Jersey City aforesaid. (3) A rate or sum for the transportation of cabbages shipped in standard barrels or barrel crates from Charleston aforesaid to Jersey City aforesaid, or New York, N. Y., which is three-fourths of the rate or sum contemporaneously charged by defendants on potatoes shipped in standard barrels or barrel crates between said points. It is further ordered that said defendants be, and they severally are hereby, required to readjust their rates for the transportation of the commodities herein above specified from Charleston aforesaid to Philadelphia, Pa., Baltimore, Md., and Washington, D. C., so as to bring them in conformity with the law when compared with rates to Jersey City or New York, which will be put into effect by said defendants under the terms of this order. And it is further ordered that the report and opinion of the commission on file herein be, and is hereby, made a part of this order, and that a notice embodying this order be sent forthwith to each of the defendants, together with a copy of said report and opinion, in con-

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formity with the provisions of the fifteenth section of the act to regulate commerce, and that a copy of said report and opinion and of this order be also served upon the Southern Railway Company, successor of the defendants the Richmond & Danville Railroad Company and F. W. Huidekoper and Reuben Foster, the receivers thereof, and upon the South Carolina & Georgia Railroad Company, successor of the defendants the South Carolina Railway Company and D. H. Chamberlain, the receiver thereof."

Thereupon the railroad companies prayed a rehearing of the matter, and, after consideration of the application and the argument in support thereof, the rehearing was denied. To the original complaints and investigation the receiver of the South Carolina Railway Company and the receivers of the Richmond & Danville Railroad Company were parties. Pending the investigation and the judgment of the commissioners, the receivers of each of these roads were discharged as such receiver. The property in their hands was sold. The South Carolina & Georgia Railroad Company became the owner of the property of the South Carolina Railway, and the Southern Railway Company that of the Richmond & Danville Railroad Company. Both of these corporations, purchasers, united in and signed the petition for rehearing. The several railroad corporations having been served with proceedings of the commission, and with its final order, judgment, and decree, the interstate commerce commission filed this bill of complaint. The bill recites, in substance, the above, and then adds: (2) That the defendants have wilfully failed and neglected to obey and conform to the requirements of said interstate commerce commission as set forth in the original order of said commission,—Exhibit E, hereto, as amended by said order, Exhibit G, hereto (orders above quoted),—"and, by so failing and neglecting, have and do continue to violate the provisions of the act to regulate commerce, at, to wit, Charleston, South Carolina, at divers other points on the lines or routes operated by them." The prayers of the bill, among others, are as follows: (3) That this court will issue a writ of injunction, to run during the pendency of this cause, restraining the said defendants herein, and each of them, their officers, agents, or servants, from continuing in their violation and disobedience of the said orders of petitioner, and that on final hearing this court will make said injunction perpetual, or will issue such

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other proper process, mandatory or otherwise, as is necessary to restrain said defendants from further continuing in such violation or disobedience. (4) That this court will, if it shall think fit, make an order that in case of any disobedience of such writ of injunction, or other proper process, mandatory or otherwise, each of the defendants guilty of such disobedience shall pay into court, or otherwise, as the court may direct, such sum of money, not exceeding the sum of \$500, for every day, after a day to be named in said order, that such defendant shall fail to obey such injunction, or other proper process. (5) That this court will grant such other and further relief in the premises as may seem meet and proper.

The right of the interstate commerce commission to institute these proceedings is derived from the act of congress approved 2d March, 1889 (25 Stat. 855, § 5). This is its sole authority therefor, and in its exercise it is bound by, and must confine itself within, the terms of the statutes. The section reads as follows:

“ Sec. 5. That section 16 of said act is hereby amended so as to read as follows: ‘ Sec. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey or perform any lawful order or requirement of the commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventeenth amendment of the constitution of the United States, it shall be lawful for the commission or for any company or person interested in such order of requirement to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be.’ ”

It will be observed that the resort to this court is in the case of the violation of, or neglect or refusal to obey or perform, any lawful order or requirement of the commission. The defendants deny that the orders in question are lawful, and on this base the present motion. The orders of the interstate commerce commission, which they seek to enforce by these proceedings, fix the rate of transportation between Charleston and New York, on strawberries, at 6 cents per quart, per crate of 32 quarts, or \$3.84 per 100 pounds. They

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fix the rate of transportation of apples, onions, turnips, squash, or cympling, or egg plant, at 59½ cents per standard barrel or crate. They fix the rate or sum for the transportation of cabbages, in standard barrels or crates, which is three-fourths the rate or sum contemporaneously charged for potatoes shipped in standard barrels or crates between said points. Are these lawful orders of the interstate commerce commission? Has the commission any authority in law to make such an order? The supreme court of the United States, at its present session, have passed upon this question, in Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184. The Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company carried freight from Cincinnati into Georgia. The through rate for transportation of less than car loads of buggies, carriages, and other first-class freight, was \$1.07 per 100 pounds; and, on all such freight carried to Social Circle, the charge was 30 cents more, which, however, was paid exclusively to the Georgia Railroad. Complaint was made to the interstate commerce commission. The commission examined into the matter, and issued its order, in two parts. They held that the charge of 30 cents additional to Social Circle was in conflict with the long and short haul clause, and ordered defendants to desist therefrom. And they add that the said defendants do, also, from and after 20th day of July, 1891, wholly cease and desist from charging or receiving any greater aggregate compensation for the transportation of buggies, carriages, and other first-class articles, in less than car loads from Cincinnati aforesaid to Atlanta, in the state of Georgia, than \$1 per 100 pounds. Application was made to the circuit court of the United States for the Northern district of Georgia to enforce these orders. The court, after full hearing, declined to grant the application. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 56 Fed. Rep. 925, 54 Am. & Eng. R. Cas. 365. The cause was carried by appeal to the circuit court of appeals of the Fifth circuit. 56 Fed. Rep. 925, 54 Am. & Eng. R. Cas. 365. That court adopted and sustained that portion of the order of the interstate commerce commission which related to the rate to Social Circle, but it disapproved and annulled that portion of the order which commanded the defendants to desist from charg-

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ing for the transportation of freight of like character from Cincinnati to Atlanta more than \$1 per 100 pounds. Both parties went up by appeal to the supreme court,—the railroads from so much of the judgment of the circuit court of appeals as relates to the freight charges to Social Circle, and the commission from so much of the decree as denies the relief prayed for in the charges fixed by it on freight from Cincinnati to Atlanta. The cause was elaborately and earnestly argued. The supreme court sustained the circuit court of appeals in both questions. It held that the latter part of the order of the interstate commerce commission was an attempt to fix rates between Cincinnati and Atlanta. On that point the court says:

“Whether congress intended to confer upon the interstate commerce commission the power to fix rates was mooted in the courts below, and is discussed in the briefs of counsel. We do not find any provision of the act that expressly, or by necessary implication, confers such power.”

The case at bar seems to be on all fours with this case. The interstate commerce commission asks this court to enforce its orders fixing rates for truck between Charleston and New York. The court can only enforce the lawful orders of the commission. As has been seen, the commission is not warranted by the act of congress to fix rates, and to this extent its order is not lawful. The bill is dismissed.

NEW YORK, P. & N. R. Co.

v.

THOMAS *et al.*

(*Supreme Court of Appeals of Virginia, Feb. 20, 1896.*)

Instructions Based on a Part of the Evidence.—It is not error to refuse an instruction which singles out certain facts which only a part of the evidence tends to prove, and ignores other parts equally important which the remainder of the evidence tends to prove.

Right of Party to Instructions in Respect to Material Facts.—Where there is evidence tending to prove material facts, the party in whose favor such evidence is has the right to have the court instruct the jury as to the law applicable to such facts.

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Negligence in Allowing Accumulation of Combustible Matter.—It is negligence for a railroad company to permit combustible matter to accumulate upon its right of way.

Evidence of Other Fires than the One in Question.—In an action to recover for fires started by a railroad engine, evidence of other fires before and after the one in question is admissible as tending to show defects in the engine of the defendant or a negligent habit in defendant's agents.

ERROR to Northampton county circuit court. *Affirmed.*

E. J. Spady, for plaintiff in error.

Fletcher & Gunter, for defendants in error.

RIELY, J.—The first assignment of error relates to the refusal of the court to give instructions numbered 1 and 2 in the form they were asked for by the plaintiff in error, and in giving them with certain amendments. The instructions, as asked for, were as follows: “ (1) If the jury believe from the evidence that the woods on the land of the plaintiffs adjoining the railway were ignited by particles of fire that issued from the defendant's engine, and by means thereof the shatters, woods manure, and down timber on said land were consumed, and the growing trees thereon injured, and stumps and butts of trees upon said woodland burnt down into the ground, leaving large and dangerous holes in many places in said woodland, this does not of itself justify the inference of negligence, but the fact of negligence must be established by additional evidence, and the burden of proof is on the plaintiffs to show it. (2) If the jury believe from the evidence that the right of way of the defendant was as clear of inflammable matter as it reasonably could be, running through a large body of woodland, and that the fire was communicated by the defendant's engine to the plaintiffs' woodland, and injuring the same, by first igniting on the defendant's right of way, this of itself does not establish the fact that the defendant was guilty of negligence in this case.” The court gave the first instruction with this amendment: “ But the above circumstances are to be considered along with the other circumstances attending said fire in determining whether there was negligence or not.” And it amended the second instruction by substituting for the conclusion, “ this of itself does not establish the fact that the defendant was guilty of negligence in this case,” the following: “ Then such fact, along with any other facts, if any, is to be considered in determining whether or not the defendant company was guilty of negli-

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gence.” The instructions in the form they were asked for were erroneous, in this: that each of them singled out certain facts which a part only of the evidence tended to prove, and ignored all the other facts which the remainder of the evidence tended to prove, and were equally important in determining whether the defendant was guilty of negligence or not; and announced to the jury that such isolated facts did not in themselves constitute negligence. A single fact may, but rarely does, constitute negligence, any more than a single link makes a chain; but a number of facts, which, viewed separately, would not make out a case of negligence, when considered together, may establish negligence as clearly as a number of links, when coupled together, surely form a chain. It was eminently proper of the court to amend the instructions asked for by the defendant in the manner it did. Calling the special attention of the jury to a part only of the evidence, and the particular fact or facts it may tend to prove, and ignoring the residue of the evidence and the facts it may tend to prove, gives undue prominence to such recited evidence, and disposes the jury to regard it and the fact it tends to prove as the particular evidence, and the fact to be relied on in determining the issue before them, and thus misleads them. Instructions in writing are carried by the jury to their room when they retire to consider of the verdict, and, if they contain a rehearsal of a part only of the evidence, their tendency is to impress unduly on the jury such part of the evidence to the disadvantage of the other evidence in the case, which may be equally or more important in determining the issue, but rests only in the memory of the jury. The instructions asked for were objectionable and improper, and the court did not err in refusing to give them as asked for and in giving them as amended by it. *Brown v. Rice*, 76 Va. 629, 659; *Railroad Co. v. Joyner*, (Va., 1895) 23 S. E. 773; and *Sack. Instruct. Juries* (2d Ed.), 18.

The next error assigned is in regard to instructions numbered 2 and 3, given by the court to the jury at the instance of the plaintiffs, which are as follows: “(2) The court instructs the jury that, although the jury may believe from the evidence that the defendant’s train was supplied with the most approved apparatus for the prevention of the emission of sparks, and that said engines were operated by the most

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skilful engineers, and that the defendant company did all that skill and science could suggest in the management of its locomotives, yet, if they further believe from the evidence that the company negligently allowed the accumulation of dangerously combustible matter on their right of way, easily to be ignited by fire from its furnaces; and if they further believe from the evidence that said fire, by igniting said combustible matter on the said company's right of way, was thence communicated to the adjacent property of the plaintiffs,—then the said defendant company is liable for all the damages resulting to their property by reason of said negligence. (3) The court further instructs the jury that if they believe from the evidence that the numerous fires have been occasioned along the defendant's road, either prior to or subsequent to the 31st day of October, 1892, by sparks issuing from the defendant's locomotives, such facts may be considered by the jury for the purpose of determining whether or not there was negligence on the part of the defendant's employees, or defects in the defendant's engine, and also for the purpose of showing a negligent habit of the officers and agents of the defendant company." The objection urged against the first of these instructions is that there was no evidence before the jury to which it was applicable, but this contention is refuted by the certificate of evidence. It discloses that there was evidence tending to prove that the fire which destroyed the property of the plaintiffs was burning, when first discovered, bunches of sedge on the right of way of the defendant company; that it extended 15 feet along the right of way; and that the fire occurred in the fall of the year, during a dry season. This evidence certainly tended, to say the least, to show that the company had been negligent in permitting combustible matter to be on its right of way in dangerous proximity to fire from its engines that were daily passing, and that, too, at a time when, owing to its dryness, it was very inflammable. When there is any evidence tending to prove a material fact in the case, the party in whose favor it is has the right, without regard to the amount of the evidence, to have the court instruct the jury as to the law arising upon the fact or facts which the evidence tends to prove, and leave to them to find whether or not the evidence is sufficient to establish the fact it was introduced to prove. Hopkins v. Richardson, 9 Gratt. 485, 496; Farish

Right of party
to instructions
in respect to
material facts.

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v. Reigle, 11 Gratt. 697, 719; *Early v. Garland*, 13 Gratt. 1; *Honesty v. Com.*, 81 Va. 283; 4 Minor, Inst., pt. 1, 747; and *Sack. Instruct. Juries*, 18. The matter of law propounded by the instructions is entirely correct, and is fully sustained by the cases of *Railroad Co. v. Medley*, 75 Va. 499, and *Railway Co. v. Rogers*, 76 Va. 413. Negligence in a railroad company may arise in many ways, and may consist just as much in negligently permitting combustible matter to accumulate on its right of way, where it is liable to be easily ignited by sparks issuing from its locomotives that are constantly passing, and thereby to communicate fire to the property of adjacent proprietors, as for an injury arising from negligence on the part of its employees, or in not providing proper machinery or suitable spark arresters. The objection urged against the other instruction is that it was broad and comprehensive in that it did not confine the consideration by the jury of other fires within any reasonable limit, or to any particular engine, but permitted them to consider other fires, however distant in time from the fire complained of. The certificate of facts discloses that evidence of other fires prior and subsequent to the fire in question was admitted on the trial without objection from the plaintiff in error. Its admission not being then objected to, it cannot now be complained of here. Instructions are to be interpreted in the light of the evidence in the case, and it is not to be presumed that the jury would or did consider other fires, if any there were, of which no evidence had been given before them by the witnesses. *Sack. Instruct. Juries*, 24; *Granite Co. v. Bailey*, (Va., 1896) 24 S. E. 232; and *Railway Co. v. Rogers*, 76 Va. 453. The instruction when inspected, shows that the jury were limited and specially directed as to the use they were authorized to make of such evidence. They were instructed that they might consider it for "the purpose of determining whether or not there was negligence on the part of the defendant's employees, or defects in the defendant's engine, and also for the purpose of showing a negligent habit of the officers and agents of the defendant company." In this there was no error. In *Railway Co. v. Rogers*, *supra*, Judge STAPLES, in delivering the opinion of the court, said: "The next error assigned is the admission of testimony on the part of plaintiff tending to show that the defendant's loco-

Negligence in
allowing ac-
cumulation of
combustible
matter.

Evidence of
other fires
than the one
in question.

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motive, on occasions other than that for which the action is brought, had emitted sparks and communicated fire to the property along its track and right of way. We are of opinion that this evidence was relevant and proper for the purpose of showing negligence on the part of the defendant's employees, or, it may be, defects in the construction of the engine in question." And in *Railroad Co. v. Richardson*, 91 U. S. 454, where evidence that some of the defendant's locomotives, at various times during the same summer before the fire in question occurred, had scattered fire when going past the property that was burned, had been admitted over the defendant's objection, the supreme court of the United States held—Justice STRONG delivering the opinion—that such evidence was admissible "as tending to prove the possibility, and a consequent probability, that some locomotive had caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company." Surely, if such evidence was admissible for these purposes, as the above-cited cases clearly decide, and which purposes are precisely the same as those stated in the instruction, it could not be error for the court to instruct the jury, after such evidence had been admitted, and that, too, without objection from the railroad company, that they might consider it for such purposes.

The only remaining assignment of error relates to the refusal of the court to set aside the verdict and grant the defendant a new trial on the ground that the verdict was contrary to the law and the evidence. The case comes before us partly upon a certificate of facts and partly upon a certificate of evidence, the facts being certified by the court only as to matters about which there was no conflict in the evidence. The court certifies as facts proved and admitted that "sparks issuing from the engine of the defendant company that passed down by the plaintiffs' woods late in the afternoon of October 31, 1892, originated the fire that burnt the plaintiffs' woods, and that the damage sustained by them by the burning of their woodland by said fire issuing from the defendant's engine amounted to the sum of \$700,—the amount named in the verdict; that numerous fires were caused by the defendant's engines along the defendant's right of way before and after October 31, 1892, in the neighborhood of the plaintiffs' land; and of four of said number one occurred every day for four

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days in succession. One of said fires started from sparks cast forty feet from defendant's right of way, some of them originated on the right of way, and some on the adjacent lands." In addition to the foregoing facts, the evidence of the plaintiffs shows, what has already been hereinbefore referred to, that the fire in question, when first discovered, was burning on the right of way of the defendant, and where bunches of sedge had been allowed to grow and remain, and was also burning in the woodland of the plaintiffs, about 10 yards from the defendant's right of way, and that the fire was continuous from the defendant's right of way to the place of burning in the woods; that the fire extended about 15 feet along the right of way; and that when the fire occurred it was a dry season. The question of negligence is one of fact, and its decision is peculiarly within the province of a jury. Taking the facts as certified, and considering the evidence as upon a demurrer to evidence, which we are required to do where the evidence is certified (section 3484, Code 1887,) we are of opinion that the verdict of the jury was right, and that there is no error in the judgment of the circuit court. The same is therefore affirmed.

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MEIXNER.

(160 *Illinois*, 320.)

Boarding Electric Car in Motion.—It is not negligence *per se* to board or alight from an electric car while in motion.

Negligence in Boarding Electric Car is a Question of Fact.—In an action for injuries sustained while attempting to board a moving electric car, the questions of negligence and contributory negligence are for the jury.

Comparative Negligence.—The doctrine of comparative negligence does not now exist in Illinois.

Instructions.—Error in modifying a requested instruction is not available on appeal, where the instruction as modified is substantially the same as another instruction given at the request of the appellant.

Duty of Trial Court to Control Counsel.—It is the duty of the trial court to control counsel, in the conduct of the trial and the argument of the case, within reasonable bounds.

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APPEAL from First district appellate court. *Affirmed.*

This was an action on the case by appellee against appellant to recover damages for personal injuries received by him while attempting to board an electric street car. A jury in the trial court returned a verdict of \$8,000 for plaintiff, on which judgment was rendered, and on appeal to the appellate court it was affirmed, 55 Ill. App. 288. The case comes to this court on an appeal from the judgment of the latter court.

J. A. Post, W. H. Barnum, and J. B. Brady, for appellant.
Brandt & Hoffmann, for appellee.

PHILLIPS, J.—One of the errors assigned for the reversal of this judgment is the refusal of the trial court to instruct the jury to find for the defendant, at the close of the plaintiff's evidence, and the refusal of the court to give a like instruction that, as a matter of law, the plaintiff had failed to make out his case, which was asked at the close of the argument. It is urged that the evidence of plaintiff did not warrant the jury in finding that the injury of plaintiff was the result of defendant's negligence, as charged in the declaration, and also that the evidence of plaintiff establishes that he was not at the time of his injury in the exercise of reasonable care and caution. Both of these matters are ordinarily questions of fact, to be determined in the trial and appellate court. As this court has frequently held, it is not our province to determine or pass upon such questions, further than to ascertain whether or not there was, at the close of plaintiff's case, evidence tending to prove the facts alleged in the declaration, and whether, at the close of all the testimony, when the motion to instruct for plaintiff was refused, the evidence, with all the inferences which the jury can justifiably draw from it, was insufficient to support a verdict for plaintiff, and that, if one was returned, it must be set aside. *Railway Co. v. Richards*, 152 Ill. 59; *Coal Co. v. Holmquist*, 152 Ill. 581; *Car Co. v. Laack*, 143 Ill. 242; *Purdy v. Hall*, 134 Ill. 298; *Railway Co. v. Dunleavy*, 129 Ill. 132, 39 Am. & Eng. R. Cas. 381; *Bartelott v. Bank*, 119 Ill. 259; *Simmons v. Railroad Co.*, 110 Ill. 340, 18 Am. & Eng. R. Cas. 50.

Two elements alleged in the declaration, and necessary to be established by plaintiff before he could recover, were negligence of the defendant, as charged, and that the plaintiff was

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in the exercise of due care and caution for his own safety. It is not the province of this court to say whether these facts are proven. The evidence before the trial court and jury tended to show that plaintiff, on August 10, 1891, was on Madison street, in Chicago, about two blocks east of Desplaines avenue. He was walking fast on the north side of Madison street, intending to board an east-bound car on appellant's line. When a car approached, and was distant 150 or 200 feet, plaintiff, still being on the sidewalk on the north side of the street, signaled to the motorman, by throwing up his hand. He then proceeded diagonally to the middle of the street, and continued walking eastwardly, in the space between the two street-car tracks. The next street crossing east of this was Thomas street. He continued between the two tracks some 25 feet east of this crossing, when the car overtook him. Appellee contends that, before the car reached him, he had seen the motorman turn the brake, so that, when he attempted to get on, the car had slackened down to a speed of about four or five miles an hour. He was still on the left-hand or the north side of the track, and desired to get on the front platform. As the car went by, he caught the hand rails on each side of the front platform, when he says the speed of the car was suddenly accelerated, and he lost his hold, was dragged some 40 feet or more, and thrown under the wheels, and his left hand was crushed off. The material facts of appellee's testimony, as above set forth, were corroborated by two spectators who witnessed the occurrence,—one from the street, and the other in an adjoining yard, not far distant. Many of these facts were contradicted by the motorman and four passengers on the front platform, who testified that the car was running at a speed of seven or eight miles an hour when it reached appellee, and that the speed had not been decreased, for the reason that no signal was seen, and that the speed was not accelerated, but, on the contrary, the current was turned off, and the brake applied, as soon as appellee attempted to get on. It was contended and testified to by these witnesses that appellee had his back turned to the car while walking, and, as the car approached and overtook him, he attempted to catch it with both hands; that the motorman at once attempted to stop the car, and did so within a space of 35 or 40 feet. Some passengers in the car also testified that there was no decrease in speed until after the accident occurred. In

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the discussion of the question as to whether the court erred in refusing to instruct the jury to find for defendant, only the facts as presented and shown by appellee's evidence will be considered. The serious results of the injury to appellee are not disputed. He was a cabinet maker, and his skill as such depended on the use of both his hands.

We have examined this record with the utmost care, to ascertain if this judgment is sustained by the record. Negligence is ordinarily a question of fact for the jury. In *Railway Co. v. Brown*, 152 Ill. 484, this court has said: "Negligence is ordinarily a question of fact. Where the evidence on material facts is conflicting, or where, on any disputed facts, fair-minded men of ordinary intelligence may differ as to the inferences to be drawn, or where, on even a conceded state of facts, a different conclusion would reasonably be reached by different minds, in all such cases negligence is a question of fact. With all the facts considered, if there is a reasonable chance of conclusions differing thereon, then it is a question for a jury. Negligence may become a question of law where, from the facts admitted or conclusively proved, there is no reasonable chance of different reasonable minds reaching different conclusions." To hold that the trial court should have given the general instruction as asked, this court must hold that it was not a question of fact as to whether or not appellee was guilty of negligence contributing to the injury, but that it was a question of law, and was negligence *per se* for the plaintiff to attempt to board the car in question, running at the rate of speed as shown. If it was a question of fact, then it was properly submitted by the trial court to the jury. This court has held in a number of cases that it is negligence for a passenger to get off a moving train of which the motive power is steam while the cars are in motion. *Railroad Co. v. Lutz*, 84 Ill. 598; *Railway Co. v. Stratton*, 78 Ill. 88; *Railroad Co. v. Chambers*, 71 Ill. 519; *Railroad Co. v. Slatton*, 54 Ill. 138; *Railroad Co. v. Randolph*, 53 Ill. 510. In *Railway Co. v. Scates*, 90 Ill. 586, this court said: "If it is to be regarded dangerous for a passenger to get off a train of cars in motion, it is likewise dangerous to get on the train when in motion. If a person is guilty of such negligence when getting off a train of cars in motion as will preclude a recovery for the injury received, upon the same principle and for the same reason a person injured in getting on a train in

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motion, and in consequence thereof, should be regarded guilty of such negligence as will prevent a recovery." The courts of other states have adopted the same rule, that it is negligence for a passenger to alight from a moving train of cars the motive power of which is steam. The rule as applicable to steam railways is relaxed when applied to horse cars or street railways. *Railroad Co. v. Buck*, 96 Ind. 346; *Stoner v. Pennsylvania Co.*, 98 Ind. 384. Beach on Contributory Negligence (section 90) says: "It is well settled that it is not contributory negligence *per se* for one to alight from or to board a moving street car, and here, again, we find the severity of the rule as applicable to steam railways essentially relaxed." Booth on Street-Railway Law (section 336) lays down the same rule in the following language: "Although the act of boarding a car while in motion is always attended with some risks, the rules applicable to persons entering cars operated by steam are not usually applied with the same strictness to street railways operated by horse power. It is a general rule, established by numerous decisions, that if a person who has the free use of his faculties and limbs has given proper notice of his desire to be taken up, and the speed of the car has been slackened in the usual manner, it is not negligence *per se* to attempt to get on while it is moving slowly, and that, if a person is injured under such circumstances, the question of his contributory negligence is ordinarily one of fact for the jury."

The doctrine is established in nearly all of the states where the question has arisen that it is not negligence *per se* for a passenger to board or alight from a street car operated by horse power, and the question of contributory negligence is one of fact for the jury. *McDonough v. Railroad Co.*, 137 Mass. 210, 21 Am. & Eng. R. Cas. 354; *Eppendorf v. Railroad Co.*, 69 N. Y. 195; *Ganiard v. Railroad Co.*, 50 Hun (N. Y.) 22; *Morrison v. Railroad Co.*, 130 N. Y. 166; *Railway Co. v. Green*, 56 Md. 84; *Railway Co. v. Williams*, 140 Ill. 275. In the case of *Sahlgaard v. Railway Co.*, 48 Minn. 232, where the motive power of the car was a cable, the same rule as above stated, was held also to be applicable. In large and populous cities, where many cars are passing, and constantly receiving and discharging passengers at crossings, it is a well-known fact that many of such passengers board cars and alight therefrom before the car has come to a full stop, and that

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they do so usually with perfect safety. It is well known, also, that street-car companies tacitly invite many passengers to board and alight from their cars by checking up to a slow rate of speed, and immediately starting up at a greater speed when the passenger is safely aboard or has alighted. It would be impossible for a court to lay down the rule as to what particular rate of speed would be sufficient notice to a passenger that, if he attempted to get on or off, he would be held guilty of contributory negligence. It would also be a great hardship, and unjust, to lay down a general rule that a passenger attempting to board any street car while in motion at all should be held in contributory negligence. Every person is supposed to know that the boarding of a moving train or car is attended with the danger of a misstep or fall, and a fall beside a moving car is liable to bring some part of the body or limbs in danger of being crushed. It is the duty of those having control and management of cars designated for traffic on the public streets to bring such cars to a full stop at such places as are convenient and necessary for the purpose of discharging and receiving passengers, and it is no less the duty of passengers, in getting on or off such cars, to observe due precaution for their own safety. We cannot say, however, that it is inconsistent with ordinary care and caution for a person to board a street car while in motion. Whether one has not exercised due care or caution in so doing is to be determined by the particular circumstances in each case, and is therefore a question of fact to be submitted to the jury.

The cases heretofore cited in which it has been held that it is not negligence *per se* for a person to board or alight from a street car while in motion have reference, in a great degree, to horse cars. As we have stated, there is a wide distinction in cases of such motive power, as the act is not in itself negligence, while in cars propelled by steam it is negligence to do so. Where the motive power is electricity, a question not entirely free from difficulty is presented. The modern progress of methods of transportation, the recent discoveries of the possibilities of electricity as a motive power, and the perfection which it has within a few years developed and attained, have demonstrated a power popular as a method of transit. The purpose to which a power of this character is applied must to some extent be considered. Where horses were formerly used, electricity

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has now in a great measure superseded. The same style and often the same cars are used, the same streets are traveled, and a like number of stops, and in like places, are made, to receive and deliver passengers. Electricity as a motive power, while stronger and more powerful and with possibilities of a greater speed, is at the same time more nearly under the control of the person in charge than horse power. The strict rule in force regarding the negligence of a person alighting or boarding an ordinary train of steam cars had for it many good and sufficient reasons, which are not applicable to the electric car as in general use. In the latter case stops are frequent, and opportunity for great speed is not presented. Steps for passengers are near the ground, and the chances of a misstep or fall are not so great as in steam cars, as constructed. Streets on such lines are generally paved, and in that respect passengers may as safely depart or board such cars in one place as another, whereas, in the case of steam cars, platforms are generally provided. While in electric cars the possibilities of speed are greater than in the case of horse cars, yet the general operation and management of such cars so nearly approaches to that of horse cars that it must be held that the same rule of law which, in the cases cited and a long line of other cases, holds that it is not negligence *per se* to board or depart from such cars while in motion is also applicable to electric cars.

It follows, therefore, from this application of the rule, that in the case at bar it was solely a question of fact as to whether or not there was negligence in the acts of the defendant, or contributory negligence on the part of the plaintiff. There was evidence tending to prove the facts alleged in the declaration, and it was not error in the trial court to refuse the general instruction asked. It was proper for the court to submit the question to the jury.

It is also urged as error that the trial court refused certain instructions, which should have been given, and modified certain other instructions, which should have been given to the jury as asked, without the modification, and that such modification was error. Sixteen instructions were asked on behalf of the defendant below, nine of which were given. Too much space would be occupied in considering in detail the objections to the instructions refused and modified. We find,

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upon an examination of such instructions, that the fifth instruction, to which a modification was made by the court, instructing the jury of the doctrine of comparative negligence, should not have been so modified. The doctrine of comparative negligence is no longer the law in this state. **Corporative negligence.** *City of Lanark v. Dougherty*, 153 Ill. 163; *Coal Co. v. Kelly*, 156 Ill. 9. It appears, however, that in the twelfth instruction asked by defendant below, and given by the court without modification, the jury were instructed, in substance, the same as the fifth instruction after the modification by the court. In the twelfth **Instructions.** instruction, referred to, the jury were told that, if they believed from the evidence that both the plaintiff and motorman were guilty of negligence contributing to the plaintiff's injury, they should find their verdict against the plaintiff, unless they believed that the plaintiff's negligence was slight, and that the negligence of the motorman was gross in comparison with the negligence of the plaintiff. While it was not proper for the court to make the modification of the fifth instruction, appellant is not now in position to complain of such modification, from the fact that it, by the twelfth instruction, asked the court to instruct the jury that such was the law. The ninth instruction given by the court to the jury, as asked by appellant and without modification, fully instructed the jury as to the law and the facts in the case. There is no reversible error in the refused or modified instructions urged by appellant.

It is strongly urged by appellant that certain remarks of counsel for appellee on the trial of this case were such as should cause a reversal of this judgment. We have examined the record very carefully, and, while we find the remarks and acts of counsel which are objected to were not of a character the trial court should permit, we are not prepared to look at them with the degree of seriousness that counsel for appellant urge in their brief. We have frequently said that it is the duty of the trial court to control counsel in the **Duty of trial court to control counsel.** conduct of a trial and in the argument of the case within reasonable bounds. It is not always possible to bring before this court the expression of counsel in making objectionable remarks, and the acts of counsel in connection therewith, so that what might in the trial court be extremely improper is not presented to us with

the same force. We are not able to see, after having carefully examined this record, that the errors assigned as to the remarks and conduct of counsel for appellee were such as in themselves should call for a reversal of this judgment.

Finding no error of law in this record, the judgment of the appellate court of the First district is affirmed. Affirmed.

NOTES

Boarding or Alighting from a Moving Street Car.—I. *View that Such Conduct is Negligence as Matter of Law.*—A few authorities incline to the view that an attempt to board, or to alight from, a moving street car is dangerous under any circumstances, and that a person injured in so doing cannot recover. *Calderwood v. North Birmingham St. R. Co.*, 96 Ala. 318; *Wheaton v. North Beach, etc., R. Co.*, 36 Cal. 590; *Harmon v. Washington, etc., R. Co.*, 6 Mackey (D. C.) 64, 30 Am. & Eng. R. Cas. 627; *Blodgett v. Bartlett*, 50 Ga. 353; *Basch v. North Chicago St. R. Co.*, 40 Ill. App. 583; *Werbowsky v. Ft. Wayne, etc., R. Co.*, 86 Mich. 236; *Ginnon v. New York, etc., R. Co.*, 3 Robt. (N. Y.) 25; *Hagan v. Philadelphia, etc., R. Co.*, 15 Phila. (Pa.) 278; *Stager v. Ridge Ave. Pass. R. Co.*, 119 Pa. St. 70, 33 Am. & Eng. R. Cas. 540; *Reddington v. Philadelphia Traction Co.*, 132 Pa. St. 154; *Woo Dan v. Seattle Electric R., etc., Co.*, (Wash.) 58 Am. & Eng. R. Cas. 195.

Thus, where a person attempted to get upon a moving horse car after he was directed to wait until the car stopped, it was held that he could not recover for an injury so sustained. *Gallagher v. West End St. R. Co.*, 156 Mass. 157, 52 Am. & Eng. R. Cas. 520. So, where plaintiff, in alighting from a moving street car, stepped off from the front platform with his back to the horses, and was dragged down while holding on to the dashboard, his conduct was held to be contributory negligence *per se*, and to justify a compulsory nonsuit. *Beattie v. Citizen's P. R. Co.*, (Pa., 1885) 1 Atl. Rep. 574.

The rule applies especially when the car is in rapid motion, in which case it is held to be gross negligence to jump from, or to attempt to board, the car. *Masterson v. Macon City, etc., R. Co.*, 88 Ga. 436; *Chicago City R. Co. v. Delcourt*, 33 Ill. App. 430; *Saffer v. Dry Dock, etc., R. Co.*, 53 Hun (N. Y.) 629, 5 N. Y. Supp. 700.

In *Sahlgaard v. St. Paul City R. Co.*, 48 Minn. 232, it is held that it is presumptively negligent for a passenger to attempt to enter a street car if it is moving at its ordinary rate of speed or with accelerated speed, and especially if the attempt is made between cars, or at the front instead of the rear of the car; but that ordinarily the question of negligence depends upon the circumstances of each case, and is for the jury.

II. *View that the Question of Negligence is one of Fact.*—According to the weight of authority, it is not negligence, as a matter of

law, for a person to get on or off a moving street car, whether the car be propelled by horses, cable, or electricity. The question of negligence is for the jury, and depends upon the circumstances of each particular case, such as the speed of the car, the activity or infirmity of the person, and the like. *Chicago City R. Co. v. Mumford*, 97 Ill. 560; *North Chicago St. R. Co. v. Williams*, 140 Ill. 275, 52 Am. & Eng. R. Cas. 522, *affirming* s. c., 40 Ill. App. 590; *North Chicago St. R. Co. v. Wrixon*, 51 Ill. App. 307; *Ober v. Crescent City R. Co.*, 44 La. Ann. 1059, 52 Am. & Eng. R. Cas. 576; *People's Pass. R. Co. v. Green*, 56 Md. 84; *McDonough v. Metropolitan R. Co.*, 137 Mass. 210, 21 Am. & Eng. R. Cas. 354; *Briggs v. Union St. R. Co.*, 148 Mass. 72, 37 Am. & Eng. R. Cas. 204; *Corlin v. West End St. R. Co.*, 154 Mass. 197; *Beal v. Lowell, etc., St. R. Co.*, 157 Mass. 444; *Schacherl v. St. Paul City R. Co.*, 42 Minn. 42, 41 Am. & Eng. R. Cas. 233; *Sahlgaard v. St. Paul City R. Co.*, 48 Minn. 232; *Fortune v. Missouri R. Co.*, 10 Mo. App. 252; *Taylor v. Missouri Pac. R. Co.*, 26 Mo. App. 336; *Duncan v. Wyatt Park R. Co.*, 48 Mo. App. 659; *Richmond v. Quincy, etc., R. Co.*, 49 Mo. App. 104; *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Doss v. Missouri, etc., R. Co.*, 59 Mo. 37; *Omaha St. R. Co. v. Craig*, 39 Neb. 601, 58 Am. & Eng. R. Cas. 208; *Morrison v. Broadway, etc., R. Co.*, 130 N. Y. 166; *Eppendorf v. Brooklyn City, etc., R. Co.*, 69 N. Y. 195, *affirming* s. c., 51 How. Pr. (N. Y.) 475; *Ganiard v. Rochester City, etc., R. Co.*, 50 Hun (N. Y.) 22; *Gilbert v. Third Ave. R. Co.*, 54 N. Y. Super. Ct. 270; *Valentine v. Broadway, etc., R. Co.*, 14 Daly (N. Y.) 540; *Seitz v. Dry Dock, etc., R. Co.*, 16 Daly (N. Y.) 264; *Rathbone v. Union R. Co.*, 13 R. I. 709, 13 Am. & Eng. R. Cas. 58. Thus, the court cannot say, as a matter of law, that an attempt to enter a horse car which is moving at the rate of about four miles an hour is negligence. *Briggs v. Union St. R. Co.*, 148 Mass. 72, 37 Am. & Eng. R. Cas. 204.

A person is not necessarily chargeable with negligence in jumping from a horse car when the horses are running away, the driver has lost control, and the car is in danger of falling over a neighboring embankment. *Dimmey v. Wheeling, etc., R. Co.*, 27 W. Va. 32.

See on this question previous notes in 3 Am. & Eng. R. Cas. 431, 21 Am. & Eng. R. Cas. 357, 30 Am. & Eng. R. Cas. 632, 44 Am. & Eng. R. Cas. 423.

ABSTRACTS OF RECENT DECISIONS.

Security Deposited by Railroad Company in Condemnation Proceedings.—A judgment in condemnation proceedings was, on appeal by the land owner, reversed without remandment, the proceedings being void because the purpose for which the land was sought to be condemned was unlawful. Thereupon the railroad company petitioned the court for the return of the security deposited by it, in order to enable it to take possession of the land pending the appeal. *Held*,

that the security should be returned, the remedy of the property owner for damages caused by the entry being an action of trespass. *Ligare v. Chicago, etc., R. Co.*, 160 Ill. 530.

Struck Jury in Condemnation Proceedings.—When a condemnation case has been appealed, and there has been a trial and judgment thereon, which has been reversed on error, and the case remitted, it is lawful for the justice holding the circuit to strike a jury, and set the case for trial on a day fixed by him. *Pennsylvania R. Co. v. National Docks Co.*, 57 N. J. L. 86.

Evidence in Condemnation Proceedings—Unfinished Street Plan Inadmissible.—In proceedings to condemn land for a railroad, a street plan of the borough in which the land was situated was received in evidence, although at the time of trial the plan had not yet been adopted by the borough authorities. *Held*, that, as the damages were to be assessed as of the time of the taking by the railroad, the future action of the borough authorities could not be allowed to receive a retroactive effect as evidence of value. *Walker v. South Chester R. Co.*, 174 Pa. St. 288.

Damages in Condemnation Proceedings are to be Assessed as of the Date of the Proceedings.—Where a railroad appropriated land for its track without making compensation to the owner, and seven years later instituted proceedings to condemn the land, it was held that the damages were to be assessed as of the date of the proceedings, and not as of the date of the original taking by the railroad company. *Louisville, etc., R. Co. v. Hopson* (Miss., 1896), 19 So. Rep. 718.

Negligence of Master in not Giving Information to Servant.—A master is as responsible for injuries caused by his negligence in not informing his servant of danger known to him, and not known by the servant, as he is for injuries caused by the personal negligence of the servant. *Mitchell v. Boston, etc., R. Co.* (N. H., 1894), 34 Atl. Rep. 674.

Negligence—Derrick Rope Falling on Track.—A blast in a quarry yard projected a fragment of stone against a derrick, thereby loosening a wire rope which supported the derrick, and causing it to fall over the track of a railroad switch running into the yard. Soon afterwards an engine and crew of the railroad company came into the yard to shift cars. In backing, the rear car struck the rope with its wheels, in consequence of which a part of the shaft with which the rope was connected was thrown upon an employee of the quarry company. *Held*, that the railroad company was not liable. *Forrest v. Philadelphia, etc., R. Co.*, 174 Pa. St. 181.

Violation of Statute requiring Gates on Elevated Train to be Closed is Negligence.—The fact that an elevated railroad company disregards a statute which requires the gates upon every passenger car used upon its elevated railroad to be kept closed while the car is in motion, is evidence of negligence. *Graham v. Manhattan R. Co.*, 149 N. Y. 336.

Negligence in Maintaining Low-Topped Bridge.—In *Atchison, etc., R. Co. v. Love* (Kan., 1896), 45 Pac. Rep. 59, it was shown that a workman on a running freight train was killed by striking his head against

a Howe truss bridge, the timbers over the top of which were only 18 feet above the rails. Said the court: "We are not prepared to say that the defendant was not guilty of very gross negligence in continuing to maintain for so many years a low bridge, over which it operated trains with furniture and other cars so high that a brakeman could not stand upon them and pass through the bridge in safety. Such structures have been strongly condemned by this court in prior cases, and if railroad companies will persist in maintaining them to the imminent peril of the lives of their employees, who are engaged in a service whose necessary hazards are so great, it does not seem any hardship to require them to respond in damages to the families of those who are killed thereby."

Overcrowding Street Cars is Negligence.—In *Richmond R., etc., Co. v. Garthright* (Va., 1896), 24 S. E. Rep. 267, it was said: "It is gross negligence in a street railway company to overcrowd and load down its cars with passengers beyond any reasonable and proper limit, and consequently not to be able to control and stop them rapidly as they approach an intersecting street, in case it may be necessary to do so to avert a collision or prevent an accident."

Negligence in not Stationing Flagmen at Crossing—Question of Fact.—Whether ordinary prudence requires a railroad company, with the knowledge that it has of the dangers at level crossings, to guard against accidents in the operation of its road by stationing flagmen at the crossings or slackening the speed of the trains, is a question of fact. *Huntress v. Boston, etc., R. Co.*, 66 N. H. 185.

Negligence in Running Street Car at Excessive Rate of Speed.—In an action against a street railway company, it appeared that the plaintiff, who was driving along the street, was compelled to take the west-bound track of the defendant, because the street on each side of the two tracks was blocked with snow; that plaintiff, having left the west-bound track to make way for a car approaching in the rear, no other car being then in sight, was prevented from at once getting back by other teams following behind the car; that after he had gone on about three quarters of a block, a car on the east-bound track, going about 20 miles per hour, came in sight over a hill; that this car, notwithstanding the motorman's attempts to stop it, ran into the plaintiff before he could get out of the way. *Held*, that defendant's negligence in running the car at a dangerous rate of speed was the proximate cause of the accident. *Harper v. Philadelphia Traction Co.*, 175 Pa. St. 129.

Negligence to Follow Dangerous Practice, even though it be Customary.—Proof of a custom to do an act in a dangerous manner will not relieve one following the custom from the charge of negligence. *George v. Mobile, etc., R. Co.* (Ala., 1896), 19 So. Rep. 784.

Negligence to Select the More Dangerous of Two Possible Ways of Doing an Act.—In an action for personal injuries, where it is shown that the plaintiff had the choice of two ways of performing a duty, one entirely safe, the other obviously and greatly dangerous, the injured party is guilty of negligence, which will bar a recovery by him, if he

adopts the dangerous way, or even the more dangerous way, where both are more or less dangerous, in discharging the service required of him. *George v. Mobile, etc., R. Co.* (Ala., 1896), 19 So. Rep. 784; *citing* *Railroad Co. v. Holborn*, 84 Ala. 137; *Railroad Co. v. Walters*, 91 Ala. 435; *Railroad Co. v. Orr*, 91 Ala. 548; *Railroad Co. v. George*, 94 Ala. 199.

Doing an Act Negligent per se is not Excused by Command of Superior.—In *George v. Mobile, etc., R. Co.* (Ala., 1896), 19 So. Rep. 784, it was said: "There can be no question, we think, that for a switchman to go into the small and irregular space which intervenes between the base beam of a pilot to an engine, which is pushing a car along as fast as a man can walk, and the car to which such engine is thus coupled, and to undertake to walk there while he uncouples the car from the engine, with the pilot immediately upon his heels, is negligence on his part, in and of itself, and to be so declared by the court as matter of law, though he may have been expressly ordered to do that thing in that particular way by one to all whose reasonable and proper orders he was bound to conform. * * * And upon the same principle the supposed emergencies of the railroad's business, requiring that the work of switching should be done in this way, because more expeditious, would not justify the doing of this obviously and greatly dangerous act." *Citing* *Kresenowski v. Railroad Co.*, 18 Fed. Rep. 229; *Davis v. Railway Co.* (Ala., 1895), 18 So. Rep. 173; *Warden v. Railroad Co.*, 94 Ala. 277.

Evidence to Support Charge of Negligence in Causing Fire.—The fact that a fire originated on the roadbed of a railroad is not sufficient of itself to support a charge of negligence; nor is the fact that leaves and grass, cut upon the roadbed the previous autumn, had remained on the ground during the winter, sufficient to support such a charge. *Taylor v. Pennsylvania Schuylkill Valley R. Co.*, 174 Pa. St. 171.

Remedy for Negligence in Starting Fires is Action of Trespass on Case.—An action against a railroad company for negligence in starting a fire from its locomotive, by means of which wood piled near the track was burned, is not an action for trespass *de bonis asportatis*, but is more accurately described as an action of trespass on the case. *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366.

Nonsuit in Action for Injuries from Negligence.—Where the testimony tended to show that the electric car of defendant was run at the rate of about 20 miles an hour, at the time of the accident, much faster than was allowable under the city ordinances, and that no gong was sounded, and no bell rung, and it was quite possible that, had the car been run at its usual legal rate of speed, and the bell rung, and gong sounded, as should have been done, the accident would not have happened, and where it was also quite possible that, had the plaintiff observed that degree of ordinary care and caution which would be expected of an ordinarily prudent man under like circumstances, the accident would not have happened, still the court held that it was for the jury to pass upon the testimony, and determine, from it, the question of the negligence of the street-car

company, under the circumstances of this case, and it was error for the trial court to grant a motion for a nonsuit. *Dederichs v. Salt Lake City R. Co.* (Utah, 1896), 44 Pac. Rep. 649.

Contributory Negligence—Question of Law and Fact.—In *Pomponio v. New York, etc., R. Co.*, 66 Conn. 528, the court said: "The general question whether the decedent was guilty of contributory negligence involves these two subordinate questions: First. What was the nature and extent of the duty to avoid injury resting upon the decedent under the circumstances? Second. Did he fully perform that duty? The first question is one of law, and is answered by saying that whether the decedent was upon the crossing as a trespasser or a licensee, or was there by implied invitation, it was his duty to use such measures to avoid danger and injury to himself as a man of ordinary prudence would have used under the same circumstances, and this was all the law required of him. The other question, whether his conduct in avoiding the dangers incident to his situation was that of a man of ordinary prudence, is clearly a question of fact, to be answered by the trier from the facts proved by the evidence. The conclusion of the trier upon this point, if he committed no error of law in reaching it, is final, and cannot be reviewed."

Negligence in Alighting from Moving Train—Question for Jury.—Whether a workman who, in obedience to the command of his superior, jumps off a slowly moving train, is guilty of contributory negligence, is a question for the jury. *Northern Pac. R. Co. v. Egeland*, 163 U. S. 93.

Injury at the Railroad Crossing—Negligence.—Decedent was killed while attempting to drive across defendant's railroad in front of a train which was approaching at the rate of 35 or 40 miles per hour. There was no gate or flagman, but there were warning signs as required by law. The railroad was straight for a mile or more in the direction from which the train was coming, and the view was unobstructed. The whistle was blown and the bell rung, as required by statute. The fireman, being engaged in putting coal in the fire-box, did not see the carriage until too late. The engineer on the other side of the locomotive did not become aware of the danger until notified by the fireman. *Held*, that it might properly be found that the collision was caused by want of due care on the part of the defendants, with no contributory want of due care on the part of the decedent. Said the court: "The knowledge which the defendants may be presumed to have of the fact that persons of ordinary prudence frequently go upon level crossings in front of moving trains, when they would wait for the trains to pass, if they had been long employed as railway managers or trainmen, is a knowledge of the danger caused by high speed and common misapprehensions and miscalculations. The defendants, presumably aware of this customary danger and its cause, are bound to act upon their superior knowledge, and to take such precautions as men of ordinary

prudence would take, under the circumstances, in their situation." *Huntress v. Boston, etc., R. Co.*, 66 N. H. 185.

Stop, Look, and Listen—Presumption in Absence of Evidence.—Where a person was killed at a grade crossing, it will be presumed, in the absence of testimony, that he stopped, looked, and listened; but this presumption may be rebutted, not only by direct evidence, but by the proof of facts and circumstances. Thus, where decedent was killed on a bright moonlight night at a crossing, within fifty feet of which an approaching train could have been seen a mile off, it was held that no recovery could be had. *Sullivan v. New York, etc., R. Co.*, 175 Pa. St. 361.

Railroad Crossings—"Stop, Look, and Listen."—Where a person killed at a railroad crossing could, while thirty or forty feet away, have seen down the track at least a quarter of a mile, it was held that he could not recover, since, if he had stopped, looked, and listened, he would have seen or heard the train, and would not have been injured. *Seamans v. Delaware, etc., R. Co.*, 174 Pa. St. 421.

Statute requiring Trains to be Stopped at Crossing of Tracks.—Violation of a statute requiring railroad trains to be stopped at least fifty feet before getting to a crossing of another track, is not excused by the fact that both railroads are leased and operated by the same company. *Chesapeake, etc., R. Co. v. Comm.* (Ky., 1896), 35 S. W. Rep. 266.

Boarding Crowded Car.—A passenger who boards a train on an elevated railroad, although the car and platform are crowded, is not, as a matter of law, guilty of contributory negligence. *Graham v. Manhattan R. Co.*, 149 N. Y. 336.

Passenger Riding on Front Platform of Street Car.—Where a passenger on a street car was riding on the front platform, although there was plenty of room inside, and was occupying the driver's stool, which was high, narrow at the base, and destitute of arms or other protection, it was held that no recovery could be had for an injury caused by his being thrown from the car. *Mann v. Philadelphia Traction Co.*, 175 Pa. St. 122.

Alighting from Moving Street Car.—Ordinarily passengers on street cars are expected to alight with some haste, but where a person is infirm, or clumsy, or encumbered with packages or other hindrances, more prudence is required than ordinarily. *Boikens v. New Orleans, etc., R. Co.*, 48 La. Ann. 831.

Injury caused by Projecting Pin on Car Platform.—A female passenger who, in attempting to alight from a train, is thrown down and injured by the catching of her dress on an extra coupling pin chained to the platform of the car, is entitled to recover, notwithstanding the fact that platforms with that arrangement are in general use on railroads and are regarded by railroad men as suitable and safe. *Illinois Cent. R. Co. v. O'Connell*, 160 Ill. 636.

Doctrine of Contributory Negligence not Abolished in Arkansas.—The doctrine of contributory negligence is not abolished by the Arkansas statute (Acts 1891, p. 213), requiring all persons running trains to

keep a constant lookout for persons and property upon the track, and making railroad companies liable for all damages from neglect to keep such lookout. *St. Louis, etc., R. Co. v. Leathers* (Ark., 1896), 35 S. W. Rep. 216.

Injury to Child on Electric Railway Track.—Where a child, injured by an electric car, was seen by the motorman before the accident, but was then standing in the street making no motion to cross the track until the car was within ten feet of her, whereupon the motorman did all he could to prevent the accident, it was held that the defendant was not liable. *Fleishman v. Neversink Mountain R. Co.*, 174 Pa. St. 510.

Injury to Trespasser on Railroad Track.—One who was injured while walking along a railroad track at a place where he had no right to be, knowing that it was about the hour for a passenger train to pass, but making no effort, by looking or listening, to inform himself of the approach of the train, was held guilty of contributory negligence. *St. Louis, etc., R. Co. v. Dingman* (Ark., 1896), 35 S. W. Rep. 219.

Lookout on Trains.—The Tennessee statute (Mill & V. Code, § 1298, subsection 4) requiring railroad companies to keep a person on each locomotive on the lookout and to sound the whistle and apply the brakes whenever any animal or other obstruction appears on the track, applies to a freight train running through the grounds of a station at which it does not stop. *Mobile, etc., R. Co. v. House* (Tenn. 1896), 35 S. W. Rep. 561.

Injury to Cattle at Railroad Crossing.—The plaintiff turned his cattle upon the highway unattended by any person. His dog drove them to a point between two railroads, which were about 80 yards apart, when he left them, and went home, in view of the plaintiff, who made no further effort to drive them across defendant's track to their pasture, where they were to go. All had crossed defendant's track but one, which remained behind a wing fence extended out from the cattle guard; and when defendant's passenger train, running at a speed of 40 miles per hour, approached, the cow ran in the direction of the other cattle, upon the track, and was killed. The engineer had sounded the whistle for the crossing, and, upon observing the cow moving from behind the wing fence, gave a succession of short blasts, but was too close to stop the train, and made no effort to stop. The place of the accident was a mile or more from any town. *Held*, that the engineer was not guilty of negligence, and that the railroad company was not liable. *Bunnell v. Rio Grande, etc., R. Co.* (Utah, 1896), 44 Pac. Rep. 927.

Fencing Right of Way.—A railroad company, which is not required by law to fence its track or right of way, in doing so only exercises extraordinary diligence to prevent danger to cattle, and is not guilty of negligence if it fails to maintain such fence. *Chicago, etc., R. Co. v. Woodworth* (Indian Ter., 1896), 35 S. W. Rep. 238.

Killing of Stock on Railroad Track.—Where the engineer and fireman of a locomotive, who were keeping a proper lookout along the track in front of a running train, saw a mule come on the track 200 or 300

feet ahead, and sounded the stock alarm, put on the air-brakes, shut off steam, and did all that could reasonably be required to prevent the injury, but the train could not have been stopped within the above distance, it was held that the killing of the mule was an unavoidable accident, for which the railroad company was not responsible. *Lovejoy v. Chesapeake, etc., R. Co.* (W. Va., 1896), 24 S. E. Rep. 599.

Jurisdiction of Justices of Peace in Stock-killing Cases not Exclusive.—The Alabama statute (Code, § 1149) giving to justices of the peace jurisdiction in all actions for injury to stock by railroads where the sum in controversy does not exceed \$100, does not take away jurisdiction in such cases from the circuit courts, which by the constitution (Art. 6, § 5) have jurisdiction in all civil matters, where the sum in controversy exceeds \$50. *Kansas City, etc., R. Co. v. Whitehead* (Ala., 1896), 19 So. Rep. 705.

Statute of Limitations in Stock-killing Cases.—The Alabama statute (Code, § 1150), prescribing a six months' limitation in actions for injury to stock, applies to such actions only when brought in a justice's court, and not when instituted in the circuit court. *Kansas City, etc., R. Co. v. Whitehead* (Ala., 1896), 19 So. Rep. 705.

Fire from Locomotive Destroying Wood Illegally Out on Public Lands.—One who illegally cuts wood upon the public lands, or purchases the same from others who have so cut it, and piles the same on another part of the public lands, does not acquire thereby such title or possession as will enable him to maintain an action for damages for its negligent destruction by fire from a railroad engine. *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366.

Evidence as to Distance Traveled by Train.—In an action for wrongful expulsion from a train, a person who travels only occasionally on railroads is competent to testify how far the train had gone from the station to the place where it was stopped and the plaintiff put off. *St. Louis, etc., R. Co. v. Brown* (Ark., 1896), 35 S. W. Rep. 225.

Improper Language of Counsel in Argument to Jury.—In an action against a railroad company for personal injuries, the plaintiff's counsel, in his argument, said: "It is a well-known fact that railroads use every means in their power to win their cases, and defendant's witnesses in this case have testified under the constant fear that their further employment depends upon their testifying as the railroad dictated." *Held*, that, while such language was manifestly improper, the refusal of the court to take it from the jury did not constitute error for which the judgment should be reversed. *Chicago, etc., R. Co. v. Pounds* (Indian Ter., 1896), 35 S. W. Rep. 249.

Fellow Servants.—Under the Texas statute relating to fellow servants (Laws, 1893, p. 120) it is held that an engineer and a switchman, who are members of the same switching crew, engaged in switching cars under a common foreman, are fellow servants, although employed and discharged by different superiors. *Gulf, etc., R. Co. v. Warner* (Tex., 1896), 35 S. W. Rep. 364.

Ordinance Regulating Right of Way at Street Car Crossings.—Failure on the part of a motorman to comply with a municipal ordinance reg-

ulating the right of way at street car crossings is not necessarily negligence *per se*, but merely evidence of negligence. *Connor v. Electric Traction Co.*, 173 Pa. St. 602.

Violation of City Ordinance in Running Engine.—In an action against a railroad company for personal injuries, the plaintiff may show at the time of the accident that the engine was running at a higher rate of speed than was permitted by city ordinance. *St. Louis, etc., R. Co. v. Eggmann*, 161 Ill. 155.

Liability of Carrier for Delay to Shipment of Live Stock.—Although the shipper by rail of live stock under a special written contract was by its terms bound, in case of accident or delay from any cause whatever, to feed, water, and take proper care of the stock at his own expense, yet where such agreement further stipulated that the carrier's employees should provide the owner or person in charge of the stock all proper facilities on train and at stations for taking care of the same, if injuries to the stock resulted from want of food, water and attention, because of the carrier's failure to furnish such facilities at the proper time upon the arrival of the stock at destination, the carrier would be liable for such injuries. *Comer v. Stewart* (Ga., 1896), 24 S. E. Rep. 845.

Injury to Passenger's Baggage Checked Over Wrong Road.—A carrier which has received baggage for transportation from a connecting line, erroneously supposing that the owners thereof had purchased tickets over its road, when in fact they had purchased tickets over a rival route, is liable to the owners only for wilful or wanton injury to their property while in its possession, and hence is not liable for the destruction of the baggage in common with its own property, caused by running the train upon a defective and unsafe bridge. *Beers v. Boston, etc., R. Co.* (Conn., 1896), 34 Atl. Rep. 541.

Modification of Contract Limiting Liability of Carrier.—Where the written contract of shipment provides that the carrier's liability shall cease on delivery to a connecting carrier at the terminus of its line, a shipper who claims compensation for injuries after delivery to the connecting line must assume the burden of proving a modification of the contract at the time of the shipment. *Keller v. Baltimore, etc., R. Co.*, 174 Pa. St. 62.

Delivery of Goods to Holder of Bill of Lading.—A bill of lading deliverable to order, when attached to and forwarded with a time draft sent without special instructions to an agent for collection, may be surrendered to the drawee on his acceptance of the draft, and a delivery of the goods to him discharges the carrier from liability. *Commercial Bank v. Chicago, etc., R. Co.*, 160 Ill. 401.

Respective Rights of the Public and Street Railway Companies at Intersecting Streets.—People and vehicles have the same right to pass along an intersecting street as a car has to go across it. The car has a right to cross and must cross the street, and vehicles and foot passengers have a right to cross and must cross the railroad track. Neither has a superior right to the other. *Richmond R., etc., Co. v. Garthright* (Va. 1896), 24 S. E. Rep. 267.

Interference with Abutting Property by Railroad Located in Street.—In an action against a railroad, running along a street, for obstructing plaintiff's passage to and from his property, which abutted on the street, it appeared that between the rails of the track and the house line there was a space of at least twenty feet for street and pavement, which, the evidence showed, gave sufficient room for vehicles to pass without inconvenience, and without crossing the track or touching the rails. It was held that to justify a recovery the obstruction must consist of a substantial interference with the use of the property, and that the above interference was not of that nature. *Louisville, etc., R. Co. v. Hooe* (Ky., 1896), 35 S. W. Rep. 266.

Jurisdiction of Court of Claims in respect to Railroad Property seized by Government during War.—Where, during the civil war, a railroad was seized by the United States Government, which removed a quantity of rails therefrom and stored them, and after the war sold them for its own benefit, it was held that the claim of the railroad for the value of the rails was not within the jurisdiction of the court of claims. *U. S. v. Winchester, etc., R. Co.*, 163 U. S. 244.

State Taxation of Lands Granted by Congress to Railroads.—Where congress confers upon the states authority to tax railroad grant lands, the legal title to which is still in the United States, no action on the part of the state or its legislature is necessary to signify its acceptance of the authority. *Central Pac. R. Co. v. Nevada*, 162 U. S. 512. Said the court in this case: "Where a grant of lands is made by congress to a state for the purpose of building a railroad, it has been customary for the state to accept such grant as authority for the conveyance of the lands to a designated railroad company; but where a simple power is given, no acceptance of such power by the state is necessary as a preliminary to its exercise."

Duty of Railroad Company to avail Itself of New Inventions.—In *Richmond R., etc., Co. v. Garthright* (Va., 1896), 24 S. E. Rep. 267, it was said: "It was the legal duty of the defendant company to provide its cars with suitable and safe machinery. It is incumbent upon a railway company, propelled by the powerful and dangerous agencies of steam or electricity, especially in a large and populous city, to use ordinary and reasonable care to avail itself of all new inventions and improvements known to it which will contribute to the safety of its passengers, and prevent accidents to others, whenever the utility of such improvement has been tested and demonstrated; but it is not required to have in use the latest improvements which human skill and ingenuity have devised to prevent accidents."

Mortgage on Chattel Property of Street Railroad.—Where a street railroad company mortgaged its chattel property, including its after-acquired property, and subsequently sold its line to another company, the mortgage cannot be held to cover rolling stock and equipment bought by the latter company for its entire road, of which the

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mortgaged line forms only a part. *Hinchman v. Point Defiance R. Co.* (Wash., 1896), 44 Pac. Rep. 867.

Railway Mortgage covering Proposed Extension of Road.—Where a mortgage on a street railway covered a proposed extension, for which the right of way had been secured and a survey made, it is enforceable as to such extension, although the latter was completed by another company, which subsequently purchased the line from the mortgagor. *Hinchman v. Point Defiance R. Co.* (Wash., 1896), 44 Pac. Rep. 867.

Specific Performance of Contract to supply Electric Power to Street Railroad.—A court of equity will not decree specific performance of a contract extending over a series of years, and imposing on plaintiff the rendition of continuous mechanical services requiring the highest degree of skill, and on defendant (an electric railway company) the duty of maintaining costly machinery, keeping it in repair, and the daily use of cars moved by electricity on the line of its railway. *Electric Lighting Co. v. Mobile, etc., R. Co.* (Ala., 1896), 19 So. Rep. 721.

Taxation of Railroads for School Purposes.—Under the constitution and statutes of Virginia, the county boards of supervisors have no power to levy taxes upon railroad property for district school purposes. *New York, etc., R. Co. v. Board of Supervisors* (Va., 1896), 24 S. E. Rep. 221.

Dedication of Railroad Land to Public.—The fact that a railroad company allowed the public to use its lot for a short cut between two avenues, does not establish a dedication, where the company, during the entire period, used the lot for the purpose of storing rails and other articles, and never ceased to assert its right to occupy the lot for its own purposes. *Frankford, etc., R. Co. v. Philadelphia*, 175 Pa. St. 120.

VARWIG

v.

CLEVELAND, C., C. & ST. L. R. CO.

(*Supreme Court of Ohio, April 28, 1896.*)

Bona Fide Purchaser.—A purchaser of land who has paid a valuable consideration therefor is a *bona fide* purchaser, within the terms of the act of February 22, 1831 (1 Swan & C. 458).

Railroads in Streets.—Where, prior to the purchase of land abutting upon a village street, a railway company has, with the consent of the owner of such land, laid in the street in front of the premises purchased a single track of its road, and is operating cars thereon, such condition

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is notice to the purchaser of a right to maintain such track; and his easement in the street, as owner of abutting land, is, to the extent of such possession and user, affected thereby. But such right will not be affected by an unrecorded deed from his grantor, executed more than six months prior, giving to the company permission to lay additional tracks, if, at the time of his purchase, the purchaser acts in good faith, and has no knowledge of the existence of such conveyance.

Proof of Knowledge.—The burden of proving bad faith or knowledge is on the company.

Bona Fide Purchaser Entitled to Order Enjoining Laying of Additional Track.—And where, in a proper action, a purchaser brings himself within the protection of the statute, he is entitled to an order enjoining the company from laying an additional track until the right is acquired by appropriation or other suitable means.

ERROR to Hamilton county circuit court. *Reversed.*

Milton Sater and Follett & Kelley, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, for defendant in error.

SPEAR, J.—The defendant is a railroad company operating a steam railroad, and the successor of the Cincinnati & Springfield Railway Company. The plaintiff is the owner of a frontage on the east side of Lebanon street, in the village of Carthage, Hamilton county, between Fifth and Sixth streets, of 508 $\frac{8}{10}$ feet. He acquired the same by purchase from one John W. Applegate, July, 1876, and then received a deed. Applegate had been the owner from the year 1870 to the above date. On May 2, 1871, the council of the village of Carthage duly passed an ordinance (which is still in force) authorizing the Cincinnati & Springfield Railway Company “to appropriate and use so much of Lebanon street and its crossings as may be necessary for the construction of the Cincinnati & Springfield Railway through said village of Carthage, and to lay their railway tracks therein”; providing, among other things, “that said Lebanon street be so graded and graveled by said railway company to permit the portion thereof not occupied by said track to be used as other streets are used to the acceptance of the village council”; and providing, further, that, for the privileges granted said railway, the village incurred no liability “for any damage which may be claimed by any citizens of the village of Carthage in consequence of injury to property caused by the construction of said railway through or across any of the streets of said village.” On the 20th of June, 1872, said

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Applegate, by deed of release, in consideration of the station and depot remaining, as per deed of even date, and \$1,500, and the advantages the grantor and public would derive from the construction of the railway, granted unto the said, the Cincinnati & Springfield Railway, "as now surveyed, * * * the right of way for so much of the railway as may pass through the following described piece, parcel, or lot of land situated in Millcreek township, Hamilton county, state of Ohio, being the same premises described in the petition; and I also hereby release to said railway company all claim for damages on account of the construction of said railway over and upon Lebanon street, Carthage, Hamilton county, Ohio, through and along said premises." Concurrent therewith, in consideration of \$1,500, he conveyed the ground on which the station then and now stands by deed. The deed for the depot grounds was recorded May 14, 1875, but the deed of release was not recorded until May 13, 1887. Lebanon street is 66 feet in width. In July and August, 1872, the railway company laid one track over and upon Lebanon street, east of the centre line of said street, the centre of the track being $40\frac{6}{10}$ feet from the west line, and $25\frac{4}{10}$ from the east line, and was the only track laid the full length of the street until after the bringing of this suit, although in May, 1887, without the consent of plaintiff, the defendant laid a track in the street between the one mentioned and plaintiff's premises, commencing at Sixth street, and extending south about $306\frac{8}{10}$ feet, and used said track for standing cars and switching purposes until June, 1892, when it was made one of the main tracks of the railway. An action is now pending to recover damages for the alleged wrongful laying of said track, upon a claim that it interferes with the use of the street, and with ingress to and egress from plaintiff's said premises. In April, 1892, the defendant having made preparations to lay a new and additional track on Lebanon street, between the original track and the premises of plaintiff, commencing at the south end of the track laid in 1887, and extending south on and over Lebanon street the full length in front of plaintiff's premises, this action was commenced to enjoin the laying of the same, for the reasons stated in the petition. A restraining order was refused by common pleas court and by the circuit court on appeal. The defendant then laid the new and additional track, the east rail of which was $6\frac{1}{2}$ feet from the curb line,

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and the overhanging cars, extending within 4 feet of the cast curb line of the street. The width of the sidewalk had been reduced from 13 to 8 feet. The company has ever since and does now use and maintain the new track as a part of its railway, and one of the main tracks thereof. Said track was laid without the consent and against the protests of plaintiff, and defendant has not in any way compensated plaintiff for the laying of the same, the interference with the use of the street, and with ingress and egress to and from his premises, and the other incidental damages suffered by plaintiff by the laying of the track. Stated in general terms, the contention of the plaintiff is that the laying of an additional track on Lebanon street imposes a burden upon his property for which he is entitled to compensation, and that, under the constitution and the decisions, this must be done before the taking; that the village council cannot prejudice his rights as an abutting owner; and that injunction is the proper remedy. For the defendant it is contended that the ordinance gave full right to go upon the street and lay all necessary tracks for its road; that this track is necessary; and that the release by Applegate bars any claim by plaintiff, both as to damages and to injunction.

Respecting the rights in a street, of the municipality and the owner of lands abutting, there has been no modification, so far as we are aware, of the plain principle announced in *Crawford v. Village of Delaware*, 7 Ohio St. 459, and followed in numberless cases since. In substance, it is that the acquisition by a municipality of land for a street involves the right to put and maintain the street in suitable condition to answer all purposes of the acquisition, to which public right all private rights of lot owners are necessarily subordinated, while there remains in the owner of abutting land, inhering in the land, and attaching to it, a private right in the street, in the nature of an incorporeal hereditament (as much property as the land itself). The decisions referred to illustrate two ideas respecting the ownership of the street,—the right of the public at large, as represented by the municipality, and the right of the owner of abutting lands. Whether the title of the municipality is acquired by grant, by common-law dedication, or by appropriation, it is held in trust for the public, with the power of control, and accompanied with the duty of keeping open, in repair, and free from nuisance. The right

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of general use and enjoyment the adjoining owner possesses in common with the public at large, and that right may be affected by whatever the municipality may lawfully do or permit respecting the street. But his separate right, being a right of property, appurtenant to his land, can be taken or invaded only upon the terms of the constitution, viz., that compensation shall be first made. And this principle controls the case at bar, and rules it in favor of the plaintiff, unless his rights are affected by the release of Applegate to the Cincinnati & Springfield Railway Company, of June 20, 1872. Should it become necessary to construe this release, then the provisions of the ordinance might be important, as throwing light on its true interpretation; but, unless this necessity arises, it can hardly be contended that the ordinance plays any part in the controversy, for, the right of the landowner being of the character of private property, it follows that the village council had no power, by ordinance or otherwise, to bargain away or impair that right.

And it is not important to consider the provisions of the ordinance with respect to the rights obtained by the company, as between itself and the public. Nor is it necessary to discuss the effect of the release as between Applegate and the company, unless it shall be found that the plaintiff is bound by its provisions, notwithstanding it was not recorded until after he purchased and took possession of the land. The answer to this question depends upon whether or not, within the meaning of our statute, the plaintiff was (1) a *bona fide* purchaser, and (2) was without knowledge, at the time of the purchase, of the prior conveyance. We understand that the term "purchaser," as read in this connection, does not mean simply one who has taken title in any way other than by descent, but does mean one who is a buyer for a valuable consideration; and the transaction of the purchaser must have been a real, and not a simulated one. No question was made below, or is made here in argument, that the plaintiff, in his dealing with Applegate by which he acquired title, was not a purchaser for value. The claim is, however, that he is not a *bona fide* purchaser with respect to the release of Applegate to the Cincinnati & Springfield Railway Company, because, seeing the single track of the railroad in the street at the time, he was bound, at his peril, to assume that the railway was there by virtue of some grant from Applegate, and that

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it was then his duty to inquire of the company, or of Applegate, or of both, as to the extent of the grant; that he is chargeable with all knowledge that inquiry would have elicited; that such inquiry would have informed him that the company had obtained from Applegate the right to lay what the ordinance permitted, to wit, its railway in the street; and that meant as many tracks as might be necessary in the operation of the road. The gist of this proposition is that the plaintiff, although a purchaser for value, was not a purchaser in good faith, within that meaning of the statute. The statute in force at the time of plaintiff's purchase (1 Swan & C. 467) provides: "That all other deeds and instruments of writing, for the conveyance or incumbrance of any lands, tenements, or hereditaments, executed agreeably to the foregoing provisions, shall be so recorded within six months from the date thereof; and if such deed or other instrument of writing shall not be so recorded within the time herein prescribed, the same shall be deemed fraudulent, so far as relates to any subsequent *bona fide* purchaser having, at the time of making such purchase, no knowledge of the existence of such former deed or other instrument of writing: provided, that such deed or other instrument of writing may be recorded after the expiration of the time herein prescribed, and from the date of such record shall be notice to any subsequent purchaser." Plaintiff was a "*bona fide* purchaser" in the fullest sense, unless he was bound to inquire. We think he was not. The pertinent rule is that which obtains in relation to commercial paper, as illustrated in *Johnson v. Way*, 27 Ohio St. 374; *Kitchen v. Loudenback*, 48 Ohio St. 177, and other cases, which, applied here, warrants the conclusion that, when it appears that the party was a purchaser for value, it is not a defense in support of a claim based on an unrecorded deed to show that he took title under circumstances which ought to have excited apprehension and inquiry in the mind of a prudent and reasonable man. No other view will give effect to the statute. Its words make absence of knowledge of the release at the time of the purchase the test; not absence of that which might induce inquiry. A holding which would substitute constructive notice, in the absence of a record, for actual knowledge, would clearly violate this statute. It appearing that the plaintiff was a purchaser for value, a pre-

Bona fide purchaser.

sumption of want of knowledge of the release at the time of the purchase was raised, and he was entitled to the protection of the statute, unless this presumption was overcome by evidence. The burden of showing such knowledge, therefore, was on the company. *Morris v. Daniels*, 35 Ohio St. 406. It offered no testimony from which such a fact may be inferred.

Burden of
proof of
knowledge.

Plaintiff concedes that he was chargeable with knowledge of the railroad, as it was built at the time of his purchase, and of the actual use then being made of the street by the company. And this is carrying the doctrine of presumption far enough. In no aspect of the case could he be bound to assume that the company had acquired the right to lay additional tracks. Had the company placed its release on record at the proper time, that, under the statute, would have been notice. Having chosen to keep it off the record for more than six months, and until after its grantor sold to a *bona fide* purchaser, that company cannot now be heard to assert that the title of that purchaser is impaired by its unrecorded release. The statute but adopts that principle of equity which holds that he in consequence of whose negligence a fraud has been committed shall sustain any resulting loss, and the rule is just, wise and salutary.

Railroads in
streets.

Upon the admitted facts, the plaintiff was entitled to an injunction preventing the laying of the additional track, and is now, as matter of strict right, entitled to a mandatory injunction. However, in consideration of the fact that the courts below refused injunction, and that the track in controversy was not put down until after the decision by the circuit court in favor of the company, and of the further fact that the traveling public would be more or less inconvenienced by a removal of the additional track, a reasonable time, to be specified in the journal entry, will be given the company to acquire from the plaintiff the right to maintain its track by a proceeding to appropriate, or by other proper means. Judgment reversed, and judgment for plaintiff in error.

Bona fide purchaser entitled to injunction.

NOTES

Injunction against the Occupation of a Street by an Ordinary Railroad.— In general, the remedy of the abutting owner lies in an action for damages, and equity will not interpose to enjoin the occupation of a street except in extraordinary cases. *Truesdale v. Peoria Grape*

Sugar Co., 101 Ill. 561, 5 Am. & Eng. R. Cas. 248; *Mills v. Parlin*, 106 Ill. 60, 14 Am. & Eng. R. Cas. 147; *Stetson v. Chicago, etc.*, R. Co., 75 Ill. 74; *Osborne v. Missouri Pac. R. Co.*, 37 Fed. Rep. 830; *Heath v. Des Moines, etc.*, R. Co., 61 Iowa 11, 10 Am. & Eng. R. Cas. 313; *Norfolk, etc., R. Co. v. Smoot*, 81 Va. 504; *Tuckahoe Canal Co. v. Tuckahoe, etc.*, R. Co., 11 Leigh (Va.) 43.

Where the injunction is allowed the court will usually dissolve it upon the company's executing a proper bond conditioned to pay all damages awarded against it. *Fouche v. Rome St. R. Co.*, 84 Ga. 233; *McMahon v. St. Louis, etc.*, R. Co., 41 La. Ann. 827. See also *Kavanagh v. Mobile, etc.*, R. Co., 78 Ga. 271, 32 Am. & Eng. R. Cas. 267; *Patterson v. Chicago, etc.*, R. Co., 75 Ill. 588; *Cairo, etc.*, R. Co. *v. People*, 92 Ill. 170; *Georgia Southern, etc.*, R. Co. *v. Ray*, 84 Ga. 376, 43 Am. & Eng. R. Cas. 95 (injunction granted until performance of condition requiring compensation); *Ross v. Georgia, etc.*, R. Co., 33 S. Car. 477, 46 Am. & Eng. R. Cas. 34. In *Iowa*, the abutting owner may always enjoin the company unless it has paid the compensation provided by statute, and this right to enjoin is not merged in an unpaid judgment for damages against the company. *Harbach v. Des Moines, etc.*, R. Co., 80 Iowa 593, 43 Am. & Eng. R. Cas. 115.

In *Arbenz v. Wheeling, etc.*, R. Co., 33 W. Va. 1, 40 Am. & Eng. R. Cas. 284, it was held that the abutting owner was not entitled to an injunction unless the value of his property was entirely destroyed.

In *Georgia, etc., R. Co. v. Ray*, 84 Ga. 376, 43 Am. & Eng. R. Cas. 95, it was held that the abutting owner might enjoin the construction of the railroad for non-payment of compensation, although the statute provided that he might institute proceedings for the assessment of damages.

Special Injury.—The construction of a railroad track in a street was held not to cause special injury to owners of abutting property, and therefore insufficient to sustain a suit for injunction. *Fogg v. Nevada, etc.*, R. Co., 20 Nev. 429, 43 Am. & Eng. R. Cas. 105.

Joinder.—In *Fogg v. Nevada, etc.*, R. Co., 20 Nev. 429, 43 Am. & Eng. R. Cas. 105, it was held that different abutting owners could not be joined as parties plaintiff; but in *Taylor v. Bay City St. R. Co.*, 80 Mich. 77, 43 Am. & Eng. R. Cas. 335, it was held that abutting owners might be joined in a suit to enjoin a railroad company.

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LINCOLN ST. RY. CO.

v.

COX.

(*Supreme Court of Nebraska, June 3, 1896.*)

Defective Appliances.—A master does not insure his servants against defective appliances. The rule is that he is bound to use such care as the circumstances reasonably demand to see that the appliances furnished are reasonably safe for use, and that they are afterwards maintained in such reasonably safe condition.

Master not Liable for Defects of which he has no Notice.—He is not liable for defects of which he has no notice, unless the exercise of ordinary care, under all the circumstances, would have resulted in notice.

Negligence not Inferred from Mere Fact of Accident.—In an action by a servant against his master for personal injuries, the jury cannot be permitted to infer negligence from the mere fact that an accident happened. A want of ordinary care must be pleaded and proved.

Instructions.—Instructions in such case which make the case turn upon the fact of a defect in the appliances, instead of upon negligence in furnishing and maintaining such appliances, are erroneous.

ERROR to Lancaster county district court. *Reversed.*

William G. Clark, for plaintiff in error.

Lamb, Adams & Scott, for defendant in error.

IRVINE, C.—Cox, a minor, by his next friend, brought this action against the Lincoln Street Railway Company to recover for personal injuries sustained by him while in the employ of the railway company. He recovered a judgment for \$800. Cox was employed in driving a team which drew what is called a "tower wagon," being a wagon bearing a scaffold used for the purpose of repairing the trolley wires by means of which the defendant's electric railway was operated. At a point near the intersection of Seventeenth and South streets, a fire alarm wire passed above the trolley wire, crossing it at an angle of 45 degrees, and placed about 14 inches above the trolley wire at the point of the crossing. The evidence tends to show that the fire-alarm wire was so located before the trolley wire was erected. Three co-

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employees of Cox were engaged in repairing the wires. In some manner, while their work was progressing, the fire-alarm wire fell across the trolley wire, and thence to the ground, where it came in contact with Cox, injuring him by burning and electric shock. The negligence alleged in the petition was in the construction of the trolley wire in dangerous proximity to the fire-alarm wire, and in permitting them to come in contact.

On the latter branch of the case, the court instructed the jury that, if the contact was brought about by the negligence of any of Cox's companions in the work, there could be no recovery, as these men were his fellow servants. This feature was therefore eliminated from the case, and the verdict must have been based upon the construction and maintenance of the trolley wire dangerously near the fire-alarm wire. On this branch of the case the court gave the following instructions: "(8) If you find, from the evidence, that, at the point where the alleged injury occurred, there had been erected across the street a fire-alarm wire, and that, after said fire-alarm wire had been erected, a trolley wire was erected along said street at said point, and thereafter the defendant took possession of said trolley wire, and when the defendant so took possession of said trolley wire it was in such close proximity to said alarm wire as that the said two wires were liable to come or be thrown together, or in contact with each other, and while said defendant was in possession of said trolley wire it was charged with electricity, and the defendant so used and operated the same so charged, and negligently or carelessly permitted or caused the said two wires thus charged with electricity to come in contact with each other, and thereby one of them was burned in two, and fell to the ground, and without the fault of plaintiff struck him, and injured him, then the defendant would be liable for such injury. * * * (10) It is the duty of a party or corporation maintaining and operating an electric railway to see that its trolley wire is reasonably safe and sound, and of sufficient distance from other electric wires as that the use to which said party or corporation puts it will not endanger the lives of persons generally, or the servants of the party or corporation so operating it. (11) If you find, from the evidence, that, at or near the point where the accident occurred, the fire-alarm wire had been erected before the trolley wire, and the trolley wire was, when erected,

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placed in such close proximity to the fire-alarm wire as to be dangerous, and you also find that, at the time of the injury to plaintiff, the employees of defendant were at work about the wire near said point, and were doing work in the line of their duty as such employees, and were doing such work in the only way it could be done, and by doing said work said wires were brought or came in contact with each other, and without fault or negligence of the plaintiff caused the injury complained of, then defendant would be liable."

In giving these instructions, especially as they were not accompanied by any instruction stating to the jury the rule of care devolving upon the defendant, we think the court erred. The effect of these instructions upon the minds of the jury must have been to make their Instructions. verdict depend upon the fact of danger in the manner in which the wires were constructed and maintained, and not upon negligence on the part of the railway company in so maintaining and constructing them. The accident undoubtedly happened, and the jury found that it was not due to the negligence of the men at work about the wires. The fact of the accident, therefore, established the fact of danger; and the instructions were equivalent to telling the jury that a verdict might be based upon the fact of the injury, without proof of negligence. This was erroneous. *Railroad Co. v. Lewis*, 24 Neb. 848; *Railroad Co. v. Howard*, 45 Neb. 570. We recognize the fact that there appears in the instructions we have quoted some language seeming to qualify this statement. For instance, in the eighth instruction, it seems to have been stated that there must be a finding that the defendant negligently and carelessly permitted or caused the wires to come in contact. But these adverbs refer to the conduct of the company or its servants in handling the wires, and are not used in connection with those parts of the instruction which relate to the erection and maintenance of the wires. Moreover, negligence and due care having been nowhere defined in the charge, the jury was left without means of properly applying the adverbs. Again, in the tenth instruction, the duty of the company was stated,—“to see that its trolley wire is reasonably safe and sound, and of sufficient distance from other wires as that * * * it will not endanger the lives of persons.” To a legal mind the word “reasonably” might, perhaps, imply the element of care.

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But we must deal with the instructions in the sense in which they would be understood by the jury. Notwithstanding these qualifying words, we think it quite clear, as already stated, that the instructions made the case turn upon the fact of danger, and not the fact of negligence.

A master does not insure his servants against defective appliances. He is not chargeable in all events because the appliances furnished his employees are defective.

Defective appliances.

He is liable only when he has been negligent in the matter. The rule is that, as to his servants, he is

bound to use such care as the circumstances reasonably demand to see that the appliances furnished are reasonably safe for use, and that they are afterwards maintained in such

reasonably safe condition. He is not liable for defects of which he has no notice, unless the exercise of ordinary care would have resulted in notice. Railroad Co. v. Finlayson, 16 Neb. 578, 18 Am. & Eng. R. Cas. 68; Railroad Co. v. Lewis, *supra*; Railroad Co. v. Broderick, 30 Neb. 735, all recognize this rule. In George H. Hammond Co. v. Johnson, 38 Neb. 244, it is said that it is the duty of a master to furnish, for the use of his servant, in the course of his employment, proper and safe appliances and instruments for the performance of the services required. But this language is used in such a connection that no intimation could reasonably be drawn from it that the duty is absolute. On the contrary, it clearly appears that it is only for negligence in failing to perform the duty that a liability exists. A peculiar rule is stated in Leigh v. Railway Co., 36 Neb. 131. This is as follows: "It is a fundamental rule of law that the master is to furnish his servants with such appliances for his work as are suitable and may be used with safety, and, if the servant is injured by reason of defective appliances placed in his hands by the master or his agent, the master will be liable, unless he can clearly show that he has used due care in the selection of the same." It would seem, from this, that the plaintiff's case would be made out on proving that he was injured through a defect in the machinery, and that the burden would then devolve upon the master, not only to show by a preponderance of the evidence, but to "clearly show" that he had used due care. We do not think that it was the intention of the writer of the opinion to convey such an im-

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pression, because every one of the ten cases he cites in support of the rule is to the effect that the master is not absolutely responsible for defects, but liable only where he has failed to exercise due care in the premises, and that the plaintiff must plead and prove such want of care. Reversed and remanded.

PLESSY

v.

FERGUSON.

(163 U. S. 537.)

Separate Coaches.—A state statute requiring railroad companies to provide separate coaches for white and colored passengers is not unconstitutional as conflicting with Const. Amend. 13, abolishing slavery.

A State Statute providing for Separate Coaches not a Violation of Const. Amend. 14.—Such a statute making any passenger insisting on going into a coach, to which by race he does not belong, liable to fine and imprisonment, is not unconstitutional as a violation of the Const. Amend. 14.

IN error to the supreme court of the state of Louisiana.
Affirmed.

This was a petition for writs of prohibition and certiorari originally filed in the supreme court of the state by Plessy, the plaintiff in error, against the Hon. John H. Ferguson, judge of the criminal district court for the parish of Orleans, and setting forth in substance the following facts:

That petitioner was a citizen of the United States and a resident of the state of Louisiana, of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege, and immunity secured to the citizens of the United States of the white race by its constitution and laws; that on June 7, 1892, he engaged and paid for a first-class passage on the East Louisiana Railway, from New Orleans to Covington, in the same state, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were

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accommodated; that such railroad company was incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race, but, notwithstanding this, petitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach, and occupy another seat, in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that, upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach, and hurried off to, and imprisoned in, the parish jail of New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the general assembly of the state, approved July 10, 1890, in such case made and provided.

The petitioner was subsequently brought before the recorder of the city for preliminary examination, and committed for trial to the criminal district court for the parish of Orleans, where an information was filed against him in the matter above set forth, for a violation of the above act, which act the petitioner affirmed to be null and void, because in conflict with the constitution of the United States; that petitioner interposed a plea to such information, based upon the unconstitutionality of the act of the general assembly, to which the district attorney, on behalf of the state, filed a demurrer; that, upon issue being joined upon such demurrer and plea, the court sustained the demurrer, overruled the plea, and ordered petitioner to plead over to the facts set forth in the information, and that, unless the judge of the said court be enjoined by a writ of prohibition from further proceeding in such case, the court will proceed to fine and sentence petitioner to imprisonment, and thus deprive him of his constitutional rights set forth in his said plea, notwithstanding the unconstitutionality of the act under which he was being prosecuted; that no appeal lay from such sentence, and petitioner was without relief or remedy except by writs of prohibition and certiorari. Copies of the information and other proceedings in the criminal district court were annexed to the petition as an exhibit.

Upon the filing of this petition, an order was issued upon the respondent to show cause why a writ of prohibition should

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not issue, and be made perpetual, and a further order that the record of the proceedings had in the criminal court be certified and transmitted to the supreme court.

To this order the respondent made answer, transmitting a certified copy of the proceedings, asserting the constitutionality of the law, and averring that, instead of pleading or admitting that he belonged to the colored race, the said Plessy declined and refused, either by pleading or otherwise, to admit that he was in any sense or in any proportion a colored man.

The case coming on for hearing before the supreme court, that court was of opinion that the law under which the prosecution was had was constitutional and denied the relief prayed for by the petitioner (*Ex parte Plessy*, 45 La. Ann. 80, 58 Am. & Eng. R. Cas. 550); whereupon petitioner prayed for a writ of error from this court, which was allowed by the chief justice of the supreme court of Louisiana.

A. W. Tourgee and *S. F. Phillips*, for plaintiff in error.

Alex. Porter Morse, for defendant in error.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts "that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to."

By the second section it was enacted "that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of

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twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state."

The third section provides penalties for the refusal or neglect of the officers, directors, conductors, and employees of railway companies to comply with the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race." The fourth section is immaterial.

The information filed in the criminal district court charged, in substance, that Plessy, being a passenger between two stations within the state of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred.

The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him; and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach, and take a seat in another, assigned to persons of the colored race, and, having refused to comply with such demand, he was forcibly ejected, with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the thirteenth amendment of the constitution, abolishing slavery, and the fourteenth amend-

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ment, which prohibits certain restrictive legislation on the part of the states.

1. That it does not conflict with the thirteenth amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument.

Slavery implies involuntary servitude,—a state of Separate
coaches. bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services. This amendment was said in the Slaughter-House Cases, 16 Wall. 36, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case, that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern states, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value; and that the fourteenth amendment was devised to meet this exigency.

So, too, in the Civil Rights Cases, 109 U. S. 3, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but only as involving an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery question into the ground," said Mr. Justice BRADLEY, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in

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the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude. Indeed, we do not understand that the thirteenth amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the fourteenth amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the state wherein they reside; and the states are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the *Slaughter-House Cases*, 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro, to give definitions of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid

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exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston*, 5 Cush. 198, in which the supreme judicial court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. "The great principle," said Chief Justice SHAW, "advanced by the learned and eloquent advocate for the plaintiff [Mr. Charles Sumner], is that, by the constitution and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. * * * But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security." It was held that the powers of the committee extended to the establishment of separate schools for children of different ages, sexes, and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by congress under its general power of legislation over the District of Columbia (sections 281-283, 310, 319, Rev. St. D. C.), as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts. *State v. McCann*, 21 Ohio St. 210; *Lehew v. Brummell*, 103 Mo. 546; *Ward v. Flood*, 48 Cal. 36; *Bertonneau v. Directors of City Schools* 3 Woods 177, Fed. Cas. No. 1,361; *People v. Gallagher*, 93 N. Y. 438; *Cory v. Carter*, 48 Ind. 337; *Dawson v. Lee*, 83 Ky. 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of con-

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tract, and yet have been universally recognized as within the police power of the state. *State v. Gibson*, 36 Ind. 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres, and railway carriages has been frequently drawn by this court. Thus, in *Strauder v. West Virginia*, 100 U. S. 303, it was held that a law of West Virginia limiting to white male persons 21 years of age, and citizens of the state, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step towards reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty, and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases. *Virginia v. Rives*, 100 U. S. 313; *Neal v. Delaware*, 103 U. S. 370; *Bush v. Com.*, 107 U. S. 110; *Gibson v. Mississippi*, 162 U. S. 565. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. *Railroad Co. v. Brown*, 17 Wall. 445.

Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the states to give to all persons traveling within that state, upon vessels employed in that business, equal right and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel who excluded colored passengers on account of their color from the cabin set aside by him for the use of whites, it was held to be, so far as it applied to interstate commerce, unconstitutional and void. *Hall v. De Cuir*, 95 U. S. 485. The court in this case, however, expressly disclaimed that it had anything whatever to do with the statute as a regulation of internal commerce, or affecting anything else than commerce among the states.

In the Civil Rights Cases, 109 U. S. 3, it was held that an

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act of congress entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, on land or water, theatres, and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the ground that the fourteenth amendment was prohibitory upon the states only, and the legislation authorized to be adopted by congress for enforcing it was not direct legislation on matters respecting which the states were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the court, Mr. Justice BRADLEY observed that the fourteenth amendment "does not invest congress with power to legislate upon subjects that are within the domain of state legislation, but to provide modes of relief against state legislation or state action of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect."

Much nearer, and, indeed, almost directly in point, is the case of the *Louisville, N. O. & T. R. Co. v. State*, 133 U. S. 587, wherein the railway company was indicted for a violation of a statute of Mississippi, enacting that all railroads carrying passengers should provide equal, but separate, accommodations for the white and colored races, by providing two or more passengers cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations. The case was presented in a different

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aspect from the one under consideration, inasmuch as it was an indictment against the railway company for failing to provide the separate accommodations, but the question considered was the constitutionality of the law. In that case, the supreme court of Mississippi (66 Miss. 662) had held that the statute applied solely to commerce within the state, and, that being the construction of the state statute by its highest court, was accepted as conclusive. "If it be a matter," said the court (133 U. S. 591), "respecting commerce wholly within a state, and not interfering with commerce between the states, then, obviously, there is no violation of the commerce clause of the federal constitution. * * * No question arises under this section as to the power of the state to separate in different compartments interstate passengers, or affect, in any manner, the privileges and rights of such passengers. All that we can consider is whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the state is no invasion of the power given to congress by the commerce clause."

A like course of reasoning applies to the case under consideration, since the supreme court of Louisiana, in the case of *State v. Judge*, 44 La. Ann. 770, held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers traveling exclusively within the borders of the state. The case was decided largely upon the authority of *Louisville, N. O. & T. R. Co. v. State*, 66 Miss. 662, and affirmed by this court in 133 U. S. 587. In the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini within the state of Louisiana. Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in *Railroad v. Miles*, 55 Pa. St. 209; *Day v. Owen*, 5 Mich. 520; *Railway Co. v. Williams*, 55 Ill. 185; *Railroad Co. v. Wells*, 85 Tenn. 613; *Railroad Co. v. Benson*, 85 Tenn. 627; *The Sue*, 22 Fed. Rep. 843; *Logwood v. Railroad Co.*, 23 Fed. Rep. 318; *McGuinn v. Forbes*, 37 Fed. Rep. 639; *People v. King*, 110 N. Y. 418; *Houck v. Railway Co.*, 38 Fed. Rep. 226; *Heard v. Railroad Co.*, 3 Inter St. Commerce Com. R. 111, 1 Inter St. Commerce Com. R. 428.

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While we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act that denies to the passenger compensation in damages for a refusal to receive him into the coach in which he properly belongs is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the state's attorney that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular state, is to be deemed a white, and who a colored, person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race.

Statute providing for separate coaches not a violation of Const. Amend. 14.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is "property," in the same sense that a right of action or of inheritance is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called "property." Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also

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authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. Thus, in *Yick Wo v. Hopkins*, 118 U. S. 356, it was held by this court that a municipal ordinance of the city of San Francisco, to regulate the carrying on of public laundries within the limits of the municipality, violated the provisions of the constitution of the United States, if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. *Railroad Co. v. Husen*, 95 U. S. 465; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, and cases cited in 161 U. S. 700; *Daggett v. Hudson*, 43 Ohio St. 548; *Capen v. Foster*, 12 Pick. 485; *State v. Baker*, 38 Wis. 71; *Monroe v. Collins*, 17 Ohio St. 665; *Hulseman v. Rems*, 41 Pa. St. 396; *Osman v. Riley*, 15 Cal. 48.

So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preser-

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vation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448: "This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts, or to abolish distinctions, based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to

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the other socially, the constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race (*State v. Chavers*, 5 Jones [N. Car.] 1); others, that it depends upon the preponderance of blood (*Gray v. State*, 4 Ohio 354; *Monroe v. Collins*, 17 Ohio St. 665); and still others, that the predominance of white blood must only be in the proportion of three-fourths (*People v. Dean*, 14 Mich. 406; *Jones v. Com.*, 80 Va. 544). But these are questions to be determined under the laws of each state, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is therefore affirmed.

Mr. Justice BREWER did not hear the argument or participate in the decision of this case.

Mr. Justice HARLAN dissenting.

By the Louisiana statute the validity of which is here involved, all railway companies (other than street-railroad companies) carrying passengers in that state are required to have separate but equal accommodations for white and colored persons, "by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition, so as to secure separate accommodations." Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons; nor any white person to occupy a seat in a coach assigned to colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race, he is subject to be fined, or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors, and employees of railroad companies to comply with the provisions of the act.

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Only "nurses attending children of the other race" are excepted from the operation of the statute. No exception is made of colored attendants traveling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

While there may be in Louisiana persons of different races who are not citizens of the United States, the words in the act "white and colored races" necessarily include all citizens of the United States of both races residing in that state. So that we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race.

Thus, the state regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the constitution of the United States.

That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed. Mr. Justice NELSON, speaking for this court in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 382, said that a common carrier was in the exercise "of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." Mr. Justice STRONG, delivering the judgment of this court in *Olcott v. Supervisors*, 16 Wall. 678, 694, said: "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly, it could

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not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use?" So, in *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676: "Though the corporation [a railroad company] was private, its work was public, as much so as if it were to be constructed by the state." So, in *Inhabitants of Worcester v. Western R. Corp.*, 4 Met. (Mass.) 564: "The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement." "It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public."

In respect to civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.

The thirteenth amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in

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this country. This court has so adjudged. But, that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the fourteenth amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside," and that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the fifteenth amendment that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, this court has further said, "that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." We also said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society,

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lessening the security of their enjoyment of the rights which others enjoy; and discriminations which are steps towards reducing them to the condition of a subject race." It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race, however well qualified in other respects to discharge the duties of jurymen, was repugnant to the fourteenth amendment. *Strauder v. West Virginia*, 100 U. S. 303, 306, 307; *Virginia v. Rives*, Id. 313; *Ex parte Virginia*, Id. 339; *Neal v. Delaware*, 103 U. S. 370, 386; *Bush v. Com.*, 107 U. S. 110, 116. At the present term, referring to the previous adjudications, this court declared that "underlying all of those decisions is the principle that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or the states against any citizen because of his race. All citizens are equal before the law." *Gibson v. Mississippi*, 162 U. S. 565.

The decisions referred to show the scope of the recent amendments of the constitution. They also show that it is not within the power of a state to prohibit colored citizens, because of their race, from participating as jurors in the administration of justice.

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute, is that it interferes with the personal freedom of citizens. "Personal liberty," it has been well said, "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, with-

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out imprisonment or restraint, unless by due course of law."

1 Bl. Comm. *134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court room, and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable.

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Mr. Sedgwick correctly states the rule when he says that, the legislative intention being clearly ascertained, "the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment." Sedg. St. & Const. Law 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are co-ordinate and separate. Each must keep within the limits defined by the constitution. And the courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly, sometimes literally, in order to carry out the legislative will. But, however construed, the intent of the legislature is to be respected if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the

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fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.

It was adjudged in that case that the descendants of Africans who were imported into this country, and sold as slaves, were not included nor intended to be included under the word "citizens" in the constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that, at the time of the adoption of the constitution, they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." 17 How. 393, 404. The recent amendments of the constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the states, a dominant race,—a superior class of citizens,—which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact,

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proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist, between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the state and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by

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citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race if his rights under the law were recognized. But he does object, and he ought never to cease objecting, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.

The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens,—our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

The result of the whole matter is that while this court has frequently adjudged, and at the present term has recognized the doctrine, that a state cannot, consistently with the constitution of the United States, prevent white and black citizens, having the required qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a state may prohibit white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a "partition" when in the same passenger coach. May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperiled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a "partition," and that,

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upon retiring from the court room to consult as to their verdict, such partition, if it be a movable one, shall be taken to their consultation room, and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race. If the "partition" used in the court room happens to be stationary, provision could be made for screens with openings through which jurors of the two races could confer as to their verdict without coming into personal contact with each other. I cannot see but that, according to the principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race, would be held to be consistent with the constitution.

I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them, are wholly inapplicable, because rendered prior to the adoption of the last amendments of the constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States, and residing here, obliterated the race line from our systems of governments, national and state, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate

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civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the "People of the United States," for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guaranty given by the constitution to each state of a republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.

For the reason stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

CALIFORNIA POWDER WORKS

v.

ATLANTIC & P. R. CO.

(*Supreme Court of California, July 17, 1896.*)

Power of Agent to Release Carrier's Liability—Explosives.—A drayman employed to transfer powder and ship it to its destination, is authorized to make a special contract of shipment with the carrier, releasing such carrier from liability for loss occasioned by fire from any cause whatsoever. As a carrier is not bound to accept powder for transportation it may accept it upon such terms as it may think necessary.

Release of Carrier's Liability.—The term of exemption releasing the carrier from liability for fire from any cause whatsoever is not void, as unconscionable or unreasonable.

DEPARTMENT 2. Appeal from superior court, city and county of San Francisco. *Affirmed.*

E. S. Pillsbury and *F. D. Madison*, for appellant.

C. N. Sterry and *Wm. F. Herrin*, for respondent.

HENSHAW, J.—Plaintiff brought its action to recover from defendant the value of a car load of blasting powder, destroyed while in transit upon defendant's railroad. The findings are not attacked. It is claimed, however, that they do not sup-

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port the judgment. It is also contended that the court erred in admitting in evidence a certain shipping order.

The facts disclosed by the findings are the following: Plaintiff was a manufacturer of powder. Its factory was situated at Santa Cruz, Cal. It had for many years been

Case stated.

in the habit of shipping its products over the line of the Southern Pacific Company, and of the Atlantic & Pacific Railroad Company, defendant herein. When the shipment was designed for a point upon the line of the defendant company, the powder was received by the agent of the Southern Pacific Company at San José, acting for the defendant company, and by this agent a shipping order was taken, and a bill of lading returned therefor. Santa Cruz, the place of manufacture of the powder, is connected with San José by a narrow-gauge railroad, owned or controlled by the Southern Pacific Company. At San José the depots of the narrow-gauge railroad and of the broad-gauge railroad (over which the powder was shipped for exportation without the state) were some distance apart. By reason of the haul upon the streets of San José from one depot to another, thus necessitated, the Southern Pacific Company declined to accept a through shipment of the powder from Santa Cruz; and, under special contract with plaintiff, the powder was shipped to San José, there transferred by an agent under the control of the plaintiff from the narrow-gauge depot to the broad-gauge station, and by this agent placed upon suitable cars provided, and shipped to its ultimate destination. "At the time of the shipment of the powder in controversy, and for several years prior thereto, the plaintiff had always employed one John McNally, who was a common drayman at San José, to haul all the powder which the plaintiff had transported to San José over the narrow-gauge railroad, and which was destined for points on the Southern Pacific or the Atlantic & Pacific, from the narrow-gauge railroad to the Southern Pacific, and to there ship it for the plaintiff to its destination; the course of business being that the secretary of the plaintiff company at San Francisco, who had charge of the shipping business of the plaintiff, would, in the case of each of said shipments, write to McNally that the shipment was made from Santa Cruz, and for him to transfer it to the broad-gauge depot, and there ship it to its point of destination, instructing him to what point and the

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name of the consignee, and sending him with his instructions a directed envelope within which to inclose the bill of lading, and mail it to the company at San Francisco, or to hand the envelope to the railroad agent, and have him mail it to the company." " McNally, on receiving such instructions, would receive the powder from the narrow-gauge railroad, and haul it upon his drays to the broad-gauge depot, and there load it himself into such car or cars as the Southern Pacific agent would designate, and, upon its being loaded, would fill out a shipping order upon printed blank first furnished by the agent of the Southern Pacific for such purpose. These blank forms were all exactly alike for all kinds of goods. * * * Upon delivery of such shipping order to the agent of the Southern Pacific, filled out and signed, such agent would have the property checked, and, if correct, would ship bill of lading, which would either be delivered to McNally, and by him sent to the company at San Francisco, or McNally would deliver to the agent an envelope directed to plaintiff company, and the agent would inclose bill of lading in the same, and forward it to plaintiff. Each of these methods was pursued indiscriminately. The shipping order was retained by the agent of the railroad company, and kept in his office, and neither it nor a copy of it would be delivered to the agent or McNally, but would always be signed in the name of the plaintiff by McNally." For several years previous to the shipment in question, plaintiff had shipped over the Southern Pacific in this manner a great deal of powder, on an average from one to two or more car loads per month. The defendant never in any way objected to taking the powder, on the ground that it was a dangerous article, and that it was not bound to carry it; nor did the defendant at any time, in any way, declare to plaintiff or to the said drayman that it would take the powder only as a private carrier. It required McNally in each instance to sign the shipping order. The plaintiff, in the case of each of said shipments, would advise McNally of the same, and direct him where to ship the powder; and the secretary would, in due course of time, receive the bill of lading. None of the officers of plaintiff's company ever authorized McNally to sign any shipping orders, or ever had any actual knowledge of the fact that he was signing such orders, nor had it actual knowledge that the defendant ever claimed that there was any different contract between them than that contained and

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expressed in the bill of lading. The conditions in the bill of lading are identical with those of the shipping order. Defendant's agent at San José had no authority to receive the goods, except upon the signing of such a shipping order, and such agent would not have received or accepted the goods unless such a shipping order was delivered to him, properly signed. There was during all of the time but one rate on powder, and no one could have procured the shipment of any powder over either of said railroads without such shipping order signed, and such bill of lading issued; the agents of both companies being furnished with but one form of shipping order and one form of bill of lading for all goods and merchandise, and having no authority to receive goods for shipment on any other terms.

The preceding quotations are from the findings, which are not attacked. The powder in question was shipped in the manner indicated. It exploded while in transit, in the territory of Arizona, entirely destroyed the car in which it was placed, partially destroyed two other cars and their contents, and killed two men upon the train. The immediate cause of the explosion is unknown, but it is found that the defendant was not guilty of any negligence or misbehavior in the matter.

The views which we take, and which will hereafter be expressed, render unnecessary the consideration of many questions ably and elaborately presented by respective counsel. They will be passed by, not as being unimportant, but as being unnecessary to this determination. Thus, we will not consider whether the bill of lading issued by the defendant to plaintiff, and by the plaintiff retained without protest, constitutes a unilateral contract, binding upon plaintiff. Nor will we consider the question whether section 2176 of the Civil Code, defining the mode in which common carriers' liability may be limited, is or is not applicable to contracts with defendant, or is or is not applicable to any contract not wholly to be performed within the state as being an unwarranted and illegal interference with and restriction upon the exclusive right of congress to regulate interstate commerce; for we are of the opinion that the shipping order signed in the name of the plaintiff by McNally as its agent was a contract within the scope of his authority to make, and therefore binding upon the plaintiff. This order conformed

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to the requirements of section 2176 of our Code; and, as it released the defendant corporation from liability for loss occasioned by "fire from any cause whatsoever," its admission in evidence was proper, and its proof relieved the defendant of liability.

The finding of the court, as above quoted, is to the effect that McNally was the authorized agent of plaintiff, not merely to haul the powder as a common drayman, but

"to ship it for the plaintiff to its destination." ^{Power of agent to release carrier's liability.} The circumstance that he was in fact a common drayman, and that defendant's agent knew him to

be such, does not militate against the force of this declaration. There was nothing inconsistent in the agency to haul as a drayman with the agency to ship as representative of the consignor. Any competent person, regardless of his profession or business vocation, might have been employed by plaintiff to ship for it. There is here no question of ostensible agency, or of a failure of defendant to make due inquiry as to the scope of the powers of the agent. The finding expressly declares that McNally was employed to ship. Having this power, he was entitled to make a special contract of shipment, as was done in this case. An agent who is employed by the owner or consignor of goods to procure them to be transported by a common carrier has a general and implied authority to make an agreement with the carrier as to the terms upon which the goods are to be transported. *Christenson v. Express Co.*, 15 Minn. 270 (Gil. 208); *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Nelson v. Railroad Co.*, 48 N. Y. 498; *Zimmer v. Railroad Co.*, 137 N. Y. 460; *Van Schaack v. Transportation Co.*, 3 Biss. 394, Fed. Cas. No. 16,876; *Aldridge v. Railway Co.*, 15 C. B. (N. S.) 582; *Jennings v. Railway Co.*, 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98; *Railroad Co. v. Jonte*, 13 Ill. App. 424; *Squire v. Railroad Co.*, 98 Mass. 239; *Hutch. Carr.*, § 265; *Wheeler, Carr.*, c. 13, § 2.

Nor are the exemptions contained in the contract of the shipping order void for lack of consideration. The defendant was not obliged to receive and transport the powder at all. A common carrier is not bound to receive goods which are so defectively packed that their condition will entail upon the company extra care and extra risk; nor dangerous articles as nitroglycerin,

Carriage of explosives.

dynamite, gunpowder, aquafortis, oil of vitriol, matches, etc. 3 Wood, Ry. Law, § 426; Hutch. Carr., § 113; 2 Rorer, R. R., § 1231; Pfister *v.* Railroad Co., 70 Cal. 169; Railroad Co. *v.* Lockwood, 17 Wall. 357; Railroad Co. *v.* Perkins, 25 Mich. 329. It was thus optional with the defendant to accept the powder for transportation or not; but, if it chose to accept it, it could accept it upon such terms and with such limitation of its common-law liability as it saw fit. Piedmont Manuf'g Co. *v.* Columbia & G. R. Co., 19 S. Car. 353. And, from the nature of the goods, the consideration expressed was sufficient to support the entire contract. York Co. *v.* Central Railroad, 3 Wall. 107.

The term of exemption releasing the carrier from liability for fire from any cause whatsoever will not be held void, as unconscionable or unreasonable. It is well settled that a common carrier may not relieve itself from any liability imposed upon it by law under the dictates of public policy; but, upon the other hand, upon any question of private right, or the right of private property, it may, for a consideration, lessen the degree of responsibility which attaches to it as an insurer, by any contract not in itself unreasonable. Any one may waive the advantage of a law intended solely for his own benefit, but a law established for a public reason cannot be contravened by private agreement. Civ. Code, § 3513. If necessary, the condition above referred to would be construed as an exemption from liability by fire occasioned by any cause, other than that of defendant's negligence. Hooper *v.* Wells, Fargo & Co., 27 Cal. 12; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174; Wells *v.* Navigation Co., 8 N. Y. 375.

The conclusion having been thus reached that the contract of the shipping order made by plaintiff's agent McNally was authorized, that it was based upon a consideration, and that its terms were reasonable, the other considerations urged, as above stated, are rendered unnecessary of determination. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; MCFARLAND, J.

NOTES

Explosives—Carrier not Bound to receive Certain Goods.—While the ordinary obligation of a carrier is to receive all goods offered for

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shipment, he may refuse to accept dangerous articles, and if there is reasonable ground to suspect their character, he may demand to examine them. Without such reasonable grounds, he cannot force the consignor to disclose their nature. *Nitro-Glycerine Cases*, 15 Wall. (U. S.) 524; *Boston, etc., R. Co. v. Shanly*, 107 Mass. 568.

Explosives—Duty to give Carrier Notice.—It is the duty of a consignor to give the carrier notice of the dangerous character of a high explosive, and he is liable for his failure to do so. *Boston, etc., R. Co. v. Shanly*, 107 Mass. 568; *Barney v. Burnstenbinder*, 64 Barb. (N. Y.) 212; *Standard Oil Co. v. Turney*, 92 Ky. 367, 49 Am. & Eng. R. Cas. 117. In *Standard Oil Co. v. Turney*, 92 Ky. 367, 49 Am. & Eng. R. Cas. 117, it was held that where the carrier is notified, the shipper is not liable merely because the knowledge was not brought home to the employee; but if the shipper and carrier enter into an agreement by which the explosive is to be shipped under some other than its real name and it is so shipped, but nothing to indicate to the employees its dangerous nature, the shipper is liable.

Criminal Liability.—In *England*, by statute it is provided that persons shipping dangerous articles without informing the carrier of their nature, must forfeit £20 for each offense. See *Herne v. Garton*, 2 El. & El. 66, 105 E. C. L. 66, where it was held that a guilty knowledge on the part of the sender of such goods was necessary to render him liable. See also *Farren v. Barnes*, 11 C. B. N. S. 553; *Williams v. East India* 5 East 192; *Alsten v. Herring*, 11 Exch. 822; *L. R. 5 Exch. 1*.

POTTER

v.

SCRANTON TRACTION CO.

(*Supreme Court of Pennsylvania, July 15, 1896.*)

Change of Motive Power—Acquiescence.—Where the consent of a borough is necessary to empower a street railway company to change its motive power, the acquiescence of the borough in the change for five years will be presumed to give such consent, and will estop the claim of an individual, in an action against the company for personal injuries, that the maintenance of the new system of motive power is negligence *per se*.

Paramount Right of Street Railway Company to Use of Street.—Although the right of an electric street railway, even to that part of the street occupied by its rails, is only in common with that of other travelers, yet it has the paramount right to the use of the street for a reasonable time, and to place there usual and ordinary appliances for the repair of its wires.

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APPEAL from Lackawanna county court of common pleas.
Affirmed.

Ward & Horn and *I. H. Burns*, for appellant.

W. H. Jessup, *Everett Warren*, *Horace E. Hand*, and
W. H. Jessup, Jr., for appellee.

MITCHELL, J.—The main contention in this case is that the railway company, not having the express consent of the borough to use the trolley system on its road, was so far a trespasser *ab initio* that its appliances both for running and repairing were nuisances, and, as against the appellant, constituted negligence in law. The discussion of this proposition would require the consideration of two questions—
Case stated. First, the right of the People's Street-Railway Company to use the trolley system on its road; and, secondly, the additional right, if any, acquired by its lessee, the traction company, under its own charter. The People's Company was chartered by special act (P. L. 1866, p. 1199) as a street passenger railway, without mention of motive power. The road was operated by horse power until 1888, when the company, without express consent of the borough, but without objection either from the borough or any abutting property owner, changed its motive power to the electric trolley system. The Scranton Traction Company was incorporated under the act of March 22, 1887 (P. L., p. 8), with an express right to use "electrical or other appliances," but subject to the consent of the borough. In 1892 it leased the People's line, and continued to operate it by the trolley system without express consent, but without objection by the borough. How far the franchise for a passenger railway, without specific limitations or prohibitions as to motive power, carries with it the right from time to time to operate it by new methods, developed in the progress of invention and experience, is an important question, which was referred to but not decided in *Reeves v. Traction Co.*, 152 Pa. St. 153, 163, and in this case it is complicated by the fact that the change was not made until after the adoption of the present constitution. It is clear that the traction company, chartered since the constitution, could not, of its own authority, make any change of motor power which would increase the servitude on the street without the municipal consent. Whether the People's Company could do so, after 1874, by virtue of implied but unused powers

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under a charter previously granted, is a matter of very serious doubt. But we do not think the appellant is in position to raise the question. The change from horse power to trolley was made in 1888, and the new motor continued in use, first by one company and then by the other, without objection, for five years before this accident occurred. Whether the consent of the borough was necessary or not, it must be presumed in this action by a private citizen. Consent may be by ratification, as well as by previous permission; and it was held, in *Pennsylvania S. V. R. Co. v. Philadelphia & R. R. Co.*, 160 Pa. St. 277, that, at least as to private parties, if not as to the municipality itself, consent may be waived by acquiescence without objection in a long-continued act. We are of opinion that, under the facts of the present case, the trolley line must be presumed to have been rightfully on the street, and therefore not a public nuisance, which entitles appellant to ask a ruling that its maintenance is negligence *per se*.

Having the right to maintain its line, the appellee of course had the right to repair it from time to time, and to use all necessary and ordinary appliances in doing so. The learned judge so charged, and, though his use of the word "paramount," in reference to such right, is assigned for error, yet it is only made such by separation from its context.

The jury were told the company "had not a paramount right, an exclusive right, to the use of the street, but they had an equal right with other travelers on the highway. They had an equal right with Mr. Potter upon the street; no greater, no less. They had the right * * * to use this appliance, if it were an usual and ordinary one, upon the track, for a reasonable time, to repair the overhead wire. Their right for a reasonable time was paramount and greater than the right of Mr. Potter." This was a correct statement of the law. It was no more than an illustration of the general rule that, although the right of a street railway, even to that part of the street occupied by its rails, is only in common with that of other travelers, yet where its right, to be available at all, must be exclusive,—as, for example, for unobstructed passage,—it is of necessity for the time being superior or paramount. *Ehrisman v. Railway Co.*, 150 Pa. St. 180.

Paramount
right of street
railway com-
pany to use of
streets.

The remaining assignments do not require further discus-

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sion. Taken in their connection, as they occurred in the charge, the expressions of the learned judge were substantially correct, and could not have misled the jury to appellant's injury. Judgment affirmed.

FISCHER

v.

CATAWISSA R. CO. *et al.**

(175 Pa. St. 554.)

Abandonment of Condemnation Proceedings.—In condemnation proceedings, a railroad alleged in its petition the location of its proposed line across the plaintiff's land, and that the bond conditioned for payment had been offered to the plaintiff and refused by him, and prayed that the bond be approved and filed in court for the plaintiff's benefit, and such bond was approved and filed, and viewers were appointed. It was *held* that the condemnation proceedings could not then be abandoned by the railroad.

APPEAL from Lycoming county court of common pleas.
Reversed.

Henry C. Parsons and Ames & Hammond, for appellant.
John G. Reading, Jr., for appellees.

STERRETT, C. J.—This case came into the court below on plaintiff's appeal from the award of viewers assessing his damages for land taken by the Catawissa Railroad Company, one of the defendants, for the purpose of constructing additional tracks and sidings. The strip of land for
Case stated. the taking of which said damages were assessed is the same land for which the plaintiff had previously (October, 1892) brought an action of ejectment against the defendant companies above named. That case, having been put at issue, was set down for trial at the next ensuing May term of court. On the eve of trial (May 1, 1893), said Catawissa Railroad Company presented its petition, in due form, setting forth, among other things, "that it has located and deter-

* See Vol. 3 Am. & Eng. R. Cas., N. S., page 1.

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mined a route for the construction of additional tracks and sidings necessary for the business and traffic of said railroad company, in pursuance of its act of incorporation," etc., to which was attached a draft of the said plaintiff's land so to be taken, etc., and further averring, in substance, that it had tendered him a bond, with sureties, in \$1,000, conditioned, etc., in due form, which he refused to accept, and praying that the same be approved and filed in court for the benefit of said Abraham Fischer, etc. On the same day the court noted on the record of the action of ejectment, "Not to be brought forward without leave of court;" and thereupon the bond was approved, filed, and viewers were appointed, as prayed for. On the coming in of the viewers' report, Fischer appealed therefrom; and in framing the issue the court directed "that the plaintiff [Fischer] shall file a statement of his claim for damages sustained by reason of the taking by the defendant of the land described in the petition, and the defendant shall enter a plea of not guilty," all of which was accordingly done. We have thus recited at considerable length the salient facts and circumstances leading up to the issue in plaintiff's appeal from the award of the viewers in the condemnation proceedings, for the purpose of more clearly presenting the legal status of the parties to the action of ejectment, and the subsequent proceeding by which the same land was taken under the right of eminent domain.

When the Catawissa Railroad Company's bond for the benefit of Abraham Fischer was approved and filed, and viewers were appointed to assess his damages for the land taken and appropriated to railroad purposes, Fischer's title to the land was divested, and his only remedy was upon the bond, in connection with the statutory remedy for assessment and collection of damages. *Fries v. Mining Co.*, 85 Pa. St. 73; *Hoffman's Appeal*, 118 Pa. St. 512; *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. St. 407. As was said in *Hoffman's Appeal*, *supra*: "When a sufficient bond, with sureties, approved by the court, has been given, the company acquires as clear and perfect right to the easement as if it had paid therefor in cash. The landowner's remedy is upon the bond, in connection with the statutory provisions for assessment and collection of damages." These are, as it were, substituted for the land, and to them alone the owner must look for his constitutional compensation.

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The issue in the condemnation proceedings appears to have been twice tried. On the last trial, after plaintiff had closed his case, the defendants offered to show that they had entered upon the land in question, and constructed their tracks, with the consent of prior owners, predecessors of the plaintiff in title, etc. The learned judge who specially presided at the trial excluded the offer on the ground that defendants were estopped by averments in the petition for approval of the bond and appointment of viewers, and their subsequent conduct; but he permitted them to withdraw the petition and bond, and to discontinue all proceedings, upon payment of costs, and filing an affidavit that the bond and petition were filed under a misapprehension of the facts, and in ignorance of their rights in the premises. This action appears to have been taken without any hearing or proof establishing the truth of the allegations contained in the affidavit, and without affording plaintiff any opportunity of showing that they were unfounded in fact. But, aside from the lack of proof to sustain the averments contained in defendants' affidavit, etc., we think the learned trial judge erred in making the order complained of. It was unwarranted by any act of assembly, or by any of our rulings in the class of cases to which this belongs. As shown by the cases above cited, the effect of the proceedings deliberately instituted by one of the defendants, including the approval and filing of the bond, appointment of viewers, etc., was to divest plaintiff's right to the possession of the land taken, and remit him to his claim for compensation, under the constitution, secured by the bond, etc. Not only had a divestiture of plaintiff's right of possession been effected, but, after the approval and filing of the bond, defendants were in the actual and rightful possession of the land in question. Under all our decisions, it was then too late to discontinue the proceedings. *Wood v. State Hospital*, 164 Pa. St. 159; *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. St. 407, and cases there cited. It follows from what has been said that the order complained of was erroneously made, and should, therefore, be reversed and wholly set aside. It is accordingly adjudged and decreed that the order or decree of court below permitting the withdrawal of the petition and bond, and authorizing the discontinuance of the proceedings for assessment of plaintiff's damages, etc., be,

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and the same is hereby, reversed and set aside, and that the said proceedings be fully reinstated, with a procedendo; and it is further ordered that all the costs, including the costs of this appeal, be paid by the defendants.

DAY

v.

NEW YORK, S. & W. R. Co.

(Court of Errors and Appeals of New Jersey, June 18, 1896.)

Consolidation does not Abate Condemnation Proceedings.—Proceedings instituted by a railroad company to acquire lands by condemnation for its road, in which commissioners have made their report and award of damages, and from which the landowner has appealed to the circuit court, do not become void *ab initio*, nor abate, by reason of the consolidation and merger of the condemning company with another railroad company, forming a new corporation under the provisions of the act of March 25, 1881 (Supp. Rev. 839-841). But the rights in the land acquired by the condemnation proceedings survive, and pass to the new corporation, and it may be lawfully substituted as appellee in the circuit court, and the causes then proceed to trial.

ERROR to Bergen county circuit court. *Affirmed.*

Abel I. Smith, Mr. Mabon, and Cortlandt Parker, for plaintiff in error.

John W. Griggs, for defendant in error.

NIXON, J.—The facts leading up to the action of the circuit court for which errors have been assigned may be summarized as follows: On the 19th of August, 1892, application was made to Justice DIXON by the Hudson River Railroad & Terminal Company for the appointment of commissioners to examine and appraise the lands of plaintiff in error required by said company for its railroad; and on the 27th day of September, 1892, after due preliminary proceedings, commissioners were appointed. On the 7th day of November, 1892, the commissioners made their report, and awarded to the plaintiff the sum of \$5,310 for the lands described in their report. A second application was made to

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the same justice, and other commissioners were appointed, who made an award amounting to \$110.10 to be paid by said company to the plaintiff for other lands to be used for its railroad. From both of these awards, appeals were taken by the plaintiff in error to the circuit court of Bergen county; and by an agreement between counsel both cases were to be tried together, and came on to be heard on the 15th day of May, 1893, before Justice DIXON in said court. After the awards of the commissioners, and while the appeals were pending, the Hudson River Railroad & Terminal Company was merged and consolidated with the New York, Susquehanna & Western Railroad Company, pursuant to the provisions of the act entitled "An act to authorize railroad companies incorporated under the laws of this and adjoining states to merge and consolidate their corporate franchises and other property," approved March 25, 1881, and the several acts supplementary thereto. Supp. Revision, 839-841. On the day of trial, counsel for the appellant produced a certified copy of the articles of agreement and consolidation of the two companies, and asked the court to adjudge that by virtue of said consolidation all proceedings theretofore had and taken to acquire the lands of appellant had become and were void *ab initio*, and that no right or benefit therefrom passed to the new consolidated company, and that the court had, by reason of such consolidation, lost all jurisdiction possessed by it in consequence of the appeals in said proceedings. The court refused to so order and adjudge, and, upon motion of counsel for the appellee, order that the new consolidated company be substituted as appellee in the circuit court, instead of the Hudson River Railroad & Terminal Company. Thereupon counsel for the appellant announced to the court that the appellant declined further to prosecute his appeals, and they were then, by order of the court, dismissed. The action of the justice in refusing to adjudge as requested by counsel for the appellant in the court below, and in substituting the new company as appellee in said causes, and in ordering the same to proceed to trial, are the errors claimed to have been made, and to which exceptions were taken, as appears by the record.

It is not shown, nor is it alleged, that, in the consolidation of the two railroad companies into the new corporation, there has not been a full compliance with all of the requirements

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and provisions of the act of March 25, 1881, authorizing the companies to merge, and therefore only the legal results of the merger are now to be considered. Section 4 of the said act provides "that upon the consummation of said act of consolidation as aforesaid, all and singular, the rights, privileges and franchises of each of said corporations, parties to the same, and all property, real, personal and mixed, and all debts due on whatever account, as well as of stock subscriptions and other things in action belonging to each of such corporations, shall be taken and deemed to be transferred to and vested in such new corporation without further act or deed; and all property, all rights of way and all and every other interests shall be as effectually the property of the new corporation as they were of the former corporations, parties to said agreement; and the title to real estate, either by deed or otherwise, under the laws of this state, vested in either of such corporations, shall not be deemed to revert, or be in any way impaired by reason of this act." The language of the statute is explicit, and no discussion of its terms is required. It is claimed in argument that this provision of the act to keep alive and transfer all rights and interests of the constituent companies, and transmit them to the new corporation, relates only to the rights and interests of the roads thus merged, but does not include or affect the rights of third persons not connected in any way with the consolidation. But we think such a construction of the act is entirely too narrow, and contrary to its express terms, as well as its evident meaning and purpose. The rights and interests that affect third persons or the public are also included. In the case of *Tomlinson v. Branch*, 15 Wall. 460, there was a consolidation of the South Carolina Canal & Railroad Company, under a statute of that state providing, among other things, that "thereupon and thereafter all the rights, privileges and property belonging to the said South Carolina Canal and Railroad Company shall be vested in the said South Carolina Railroad Company"; and Justice BRADLEY, in delivering the opinion of the court, in referring to the legal effect of this provision of the act, said (page 465): "The keeping alive of the rights and privileges of the old company, and transferring them to the new company, in connection with the property, indicate the legislative intent that such property was to be holden in the same manner, and subject to the same rights, as before.

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The owners of the property were to lose no rights by the transfer, nor was the public to lose any rights thereby. Of course, these remarks do not apply to those corporate rights and franchises of the old company which appertain to its existence and functions as a corporation. These became merged and extinct. But all its rights and duties, its privileges and obligations, as related to the public and third persons, remain and devolve upon the new company." Whether such rights pass by virtue of a special enactment, or by a general act, is immaterial, the meaning and object of this provision of the acts being substantially the same in both cases.

It is also insisted that while a general right to condemn lands for its road would survive, and pass to the new corporation, instituted but incompleted proceedings to acquire land for its railroad are not in any sense property or rights, or things in action, or such other interests as could be the subject of transfer by virtue of the merger, under the act of March 25, 1881. We can see no ground for such a contention. There are rights of various kinds, inchoate as well as absolute, and no distinction is made between any of these rights in the terms of the act. That the Hudson River Railroad & Terminal Company had acquired both a right and interest in the lands of the plaintiff in error which had been condemned, and for which damages had been duly assessed and awarded by commissioners, before its merger with the New York, Susquehanna & Western Railroad Company, cannot be doubted. Its right to take complete possession and control of these lands only awaited the determination of the appeals then pending in the circuit court. In the case of *Mettler v. Railroad Co.*, 25 N. J. Eq. 214, the chancellor, in discussing the effect of condemnation proceedings upon the rights of the person whose land had been taken, and pending an appeal, said (page 218): "The condemnation proceedings deprived him of his full dominion over his property. From that time he could not sell, lease, or pledge it. At most, he could only occupy it until his compensation should have been fixed, and paid or tendered to him." The rights thus obtained by the Hudson River Railroad & Terminal Company in the lands of the plaintiff in error by the instituted but incompleted proceedings to condemn were both important and valuable, and they passed to

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does not abate
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proceedings.

and were vested in the new corporation by reason of the merger and consolidation. In the case of *Railway Co. v. Hooper*, 76 Cal. 404, many questions similar to those raised in this case were discussed by the court, and disposed of. In speaking of certain proceedings instituted by the company for the condemnation of land for the use of its road, the court said: "The agency is in its nature an office. The corporation is a trustee prosecuting the proceedings primarily for the state, which by its legislature has declared the use to be public. By permitting a consolidation of the corporation with others, and the creation of a new corporation thereby, the new creature is made a corporation like each of the others. Aside from the franchise to be a corporation, which is the same as that of each of the consolidating companies, it acquires the rights and franchises to build and operate the roads which all the others had the right to build and operate, and, with this last, the right to commence or prosecute an action for condemnation of property necessary to the building and operation of each of such roads. Had consolidation occurred before the commencement of this proceeding, the plaintiff could have begun it. By reason of the subsequent consolidation, it took the place, in all respects, so far as this proceeding is concerned, of the original plaintiff."

We hold that the New York, Susquehanna & Western Railroad Company was lawfully substituted as appellee in the causes pending in the circuit court of Bergen county. Judgment should be affirmed.

NOTES.

Right of Consolidated Company to Condemn Lands.—The power of a railroad company to begin proceedings for the condemnation of lands within the state is not lost by its consolidation with another railroad company into a new organization so as to constitute a corporation subject to the laws of the same state as the original company. *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378., followed in *Mineral Range R. Co. v. Detroit, etc., Copper Co.*, 25 Fed. Rep. 515.

While section 8 of article 11 of the Nebraska constitution provides that no railroad corporation organized under the laws of another state, or of the United States, and doing business in this state, shall be entitled to exercise the right of eminent, domain or have power to acquire the right of way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state, it does not prohibit

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existing railroad companies, one of which is a domestic corporation, from becoming a body corporate by consolidation, instead of by the formation of a new corporation, providing such consolidation is made pursuant to the laws of this state permitting the same, and by which it became "a body corporate pursuant to and in accordance with the laws of this state." *State v. Chicago, etc., Co.*, 25 Neb. 156, 36 Am. & Eng. R. Cas. 504, commented on in *Koenig v. Chicago, etc., R. Co.*, 27 Neb. 699. See Vol. 3, Am. & Eng. R. Cas., New Series, page xx.

Consolidation—Effect on Pending Suits in General.—The consolidation of a corporation with another, does not abate a suit pending at the time of such consolidation. *Evans v. Interstate, etc., R. Co.*, 106 Mo. 594, *distinguishing* *Indianola R. Co. v. Fryer*, 56 Tex. 600, 11 Am. & Eng. R. Cas. 325; *Shackleford v. Mississippi Cent. R. Co.*, 52 Miss. 159; *Baltimore, etc., R. Co. v. Musselman*, 2 Grant's Cas. (Pa.) 348.

The consolidated company may be substituted for the defendant company without the issue of process against it. *Kinion v. Kansas City, etc., R. Co.*, 39 Mo. App. 382.

In *Kansas, etc., R. Co. v. Smith*, 40 Kan. 192; *Selma, etc., R. Co. v. Harbin*, 40 Ga. 706, it was held that where railroad companies consolidated with other railroad companies, that an action brought by or against such company before its consolidation cannot afterwards be prosecuted by or against it in its original name.

 SANFORD

v.

PAWTUCKET STREET-RY. CO.

(*Supreme Court of Rhode Island, July 11, 1896.*)

Street-Railway Company Not Liable for Negligence of Independent Contractor.—A street-railway company, which was empowered by its charter to build a street railroad, employed a contractor to construct the road, not stipulating the particular manner in which the construction should be carried out. *Held*, that the street railway company was not liable for injuries caused to a person by a wire stretched across the street by the contractor in the construction of a road.

Power of Railway Company to Delegate Its Charter Rights.—The principle that a railroad company cannot delegate to a contractor its right by charter to construct a railroad so as to exempt it from liability does not extend to the use of the ordinary means employed for the construction of the road, but to the use of such extraordinary powers as the cor-

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poration itself could not exercise without first having complied with the conditions of the legislative grant.

Negligence of Independent Contractor.—The provisions of a charter making a street-railway company liable for the negligence of its agents and employees in the construction of its road does not apply to independent contractors.

J. F. Lonsdale, J. S. G. Cobb, and J. M. Ripley, for plaintiff.

D. S. & W. C. Baker, for defendant.

TILLINGHAST, J.—The first count in the declaration alleges that the defendant corporation, by its agents and servants, negligently, carelessly, and wrongfully placed and stretched, and negligently and wrongfully main- Case stated. tained, a rope or wire across Lonsdale avenue, a public highway in the city of Pawtucket, whereby said highway was rendered dangerous to travelers in carriages, and that the plaintiff, while riding along said highway in a carriage, in the exercise of due care, was caught by said rope or wire, and thrown to the ground, receiving serious bodily injury. The second count alleges that the defendant is a corporation, incorporated by the general assembly of the state, and that in the charter it is provided that the defendant shall be liable for any loss or injury that any person shall sustain by reason of any carelessness, neglect, or misconduct of its agents or servants in the construction, management, or use of its tracks, or of the streets where its tracks are laid; that the defendant intrusted the construction of its road, under a contract made by said defendant with certain contractors, not residing in the state, to said contractors, and that the latter, in the process of such construction, on, to wit, the 3d day of December, 1891, at said Pawtucket, negligently and carelessly placed and maintained a rope or wire across said Lonsdale avenue, in such a manner as to render said highway dangerous to travelers in carriages, whereby the plaintiff, on, to wit, said 3d day of December, 1891, who was then and there riding in a carriage along said public highway, in the exercise of due care, was caught by said rope or wire, thrown to the ground, and seriously injured, etc. To the first count of this declaration the defendant has filed a plea of not guilty. To the second count the defendant has filed a special plea in bar, setting up that the acts and deeds complained of therein were not the

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acts and deeds of the said defendant corporation, nor the acts and deeds of any of its servants or agents, but were the acts and deeds of an independent contractor, over whom, and over whose agents and servants, said defendant corporation had no management, care, or control; and also setting up that the said defendant corporation had no notice whatever of the alleged wrongful acts of said independent contractor, and that said wrongful acts did not continue for a sufficient length of time to impute notice thereof to the said defendant corporation. To this special plea in bar the plaintiff has demurred, on the grounds (1) that the fact that the work was done by an independent contractor, as set forth in said plea, does not constitute a valid defense to the plaintiff's cause of action; (2) that the lack of notice to the defendant, as set forth in said special plea, does not constitute a valid defense to the plaintiff's cause of action; and (3) that said facts in regard to the work being performed by an independent contractor and said want of notice, as set forth in said plea, do not together constitute a valid defense to the plaintiff's cause of action.

The only question before us for decision, therefore, is as to the sufficiency of said special plea in bar. The plaintiff admits at the outset that the law, as stated by this court in *Williams v. Tripp*, 11 R. I. 454, 455, is correct, viz., that "when a person has work done for him under contract, without reserving to himself any direct control of the contractor or of his men, there is no relation of principal and agent, or of master and servant, between him and them, and consequently no such liability for their torts and negligences as is incident to that relation." But he contends that to this well-recognized rule there is one equally well-recognized exception, and that is that no one can escape from the burden of an obligation imposed upon him by law by the engaging for its performance a contractor. In view of this contention, it becomes necessary to ascertain precisely what obligation was imposed by law upon the defendant corporation regarding the construction of its road. Under the provisions of section 3 of its charter, the duties devolved upon the corporation are these, viz.: That it must put the streets and highways, in which it shall lay any rails, in as good condition as they were, and keep in repair such portions of the streets as shall be occupied by its tracks; and it makes it liable for any loss or injury that any person shall sustain by reason of any careless-

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ness, neglect, or misconduct of its agents and servants in the management, construction, or use of said tracks or streets. Of course, the defendant cannot discharge itself from its statutory obligations by engaging for their performance by another; that is to say, it is bound, at its peril, to put the streets in which it shall lay any rails in as good condition as they were before, and to keep in repair such portions of the streets as shall be occupied by its tracks, and hence, if it should contract with a third person to do this work, and this third person should fail to do it, the defendant would doubtless be liable. *Hole v. Railway Co.*, 30 Law J. Exch. 81, 6 Hurl. & N. 488. But such is not the case before us. Here the case shows, not that the defendant failed to perform its said statutory duty, but that an independent contractor, in constructing the road,—a thing which the defendant had the right to do itself, but was under no obligation to do,—was guilty of negligence. This negligence, however, cannot be imputed to the defendant, as the relation of master and servant was not created by the contract between the parties. The defendant had no control, either of the work or of the workmen employed to perform it. It merely prescribed the end to be accomplished, and contracted with another to accomplish that end by such means as the latter might in his discretion employ. And hence, as to the means employed, the contractor was not a servant or agent of the defendant, but himself a master, and for any negligence in connection therewith he alone is liable. The defendant made no agreement with the contractor as to the particular manner in which the road should be constructed or the trolley wire erected; that is to say, the defendant did not authorize the contractor to place, stretch, or maintain a wire or rope across the street in the manner complained of. He was simply authorized to construct the road, thus leaving the manner of doing the same to his skill and judgment. Moreover, the work authorized to be done was not in itself a nuisance, nor was it necessarily dangerous or injurious. It was authorized by law. The manner in which it was done was the sole cause of the injury complained of. Hence the obstruction or defect created in the street was purely collateral to the work contracted to be done, and was entirely the result of the wrongful or careless acts of the contractor or his workmen; and in such case it is well settled

Street railway company not liable for negligence of independent contractor.

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that the employer is not liable. *Robbins v. Chicago City*, 4 Wall. 679. It is to be observed, also that the defendant not only did not authorize the obstruction complained of, but had no notice thereof, either express or implied.

Had the obstruction resulted directly from the act which the contractor agreed and was authorized to do, then both the defendant and the contractor would have been equally liable to the injured party. *Water Co. v. Ware*, 16 Wall. 576; *Carman v. Steubenville*, 4 Ohio St. 399. This principle is well illustrated in *Ellis v. Gas Consumers' Co.*, 2 El. & Bl. 767. There the defendant made a contract with Watson Bros. to open trenches along the streets of Sheffield, in order that defendant might lay gas pipes therein, and afterwards to fill up the trenches and make good the surface with flagging. Watson Bros., by their servants, opened the trenches along one of the streets in question, and after the pipes were laid proceeded to fill up said trenches and restore the flagging. In doing so, however, they carelessly left a heap of stones and earth upon the footway; and the plaintiff, passing along the street, fell over the same, and was injured. Neither the defendant nor Watson Bros. had any legal excuse for breaking open the street in the manner described, which was a public nuisance. In a suit against the gas company to recover for the injury sustained, the court held that the cause of the accident was the very thing done in pursuance of the specific directions of the defendant contained in their contract, and not the negligence of those doing the thing, and hence that defendant was liable. *Town of Pawlet v. Rutland & W. R. Co.*, 28 Vt. 297, is strongly in point. In that case the defendant had made a contract with Page & Eastman to build a section of its road. Page & Eastman underlet a job of building the abutments of a bridge to one Chandler, who, with his own men, built the abutments. And the obstruction in the highway which caused the injury to the plaintiff was the act of Chandler's employees in drawing the stone for the abutments. The court held that, as the act contracted to be done was a lawful one, and in no way involved the commission of a public nuisance, and that as it had become such purely from the neglect of the person who had contracted to do the job, the latter alone was liable for the damage occasioned. To the same effect are *Pack v. Mayor, etc.*, 8 N. Y. 222; *Hole v. Railroad Co.*, 6 Hurl. & N. 488; *Peachey v. Rowland*, 13

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C. B. 162; Hilliard v. Richardson, 3 Gray 349; Bailey v. Railroad Co., 57 Vt. 252; Storrs v. City of Utica, 17 N. Y. 104; Hughes v. Railway Co., 39 Ohio St. 461; and numerous other cases which might be cited.

Again, the principle that a railroad company cannot delegate to a contractor its chartered rights and privileges, so as to exempt it from liability, does not "extend to the use of the ordinary means employed for the construction of the road, but to the use of such extraordinary powers as the corporation itself could not exercise without first having complied with the conditions of legislative grant." In other words, where the wrong and injury for which the action is brought were committed in the performance of acts by virtue of the authority of the corporation derived from its charter, and could have been performed in no other way, then the party injured has the right to hold the corporation responsible, "because it is really the corporation that is acting." West v. Railway Co., 63 Ill. 546, 547; Cunningham v. Railroad Co., 51 Tex. 513; Railroad Co. v. Fitzsimmons, 18 Kan. 34; Eaton v. Railway Co., 59 Me. 520; Callahan v. Railway Co., 23 Iowa 562; West v. Railway Co., 63 Ill. 545. This doctrine is well illustrated in the case of Rogers v. Railroad Co., 31 S. Car. 370, cited by defendant's counsel. The statute of that state makes a railroad company "responsible in damages to any person or corporation whose buildings or other property may be injured by fire * * * originating within the limits of the right of way of such road, in consequence of the act of any of its agents or employees." In that case the gradation of a portion of the road was let out under contract to one Hardin. During the progress of the work a fire, which had been kindled within the right of way of the defendant, escaped therefrom, and ran over the adjoining land of the plaintiff, causing him damage. It was contended on the part of the plaintiff that the defendant was liable, on the ground that "when the employer, as a corporation, is charged with certain obligations, reciprocal to the privileges and franchise granted, it cannot shift the responsibility from itself by employing a contractor to do the work for it." In reply to this contention the court said: "If it means that a railroad corporation, on account of the large powers generally granted to them, eminent domain, etc., cannot be allowed to construct their track, etc., through an independent

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contractor, but must do such work through their own servants and employees, we have only to say that we have found no authority for such a position. * * * If it means that where certain obligations exist, growing out of the privileges and franchises granted to the corporation, which would be inconsistent with the right of the company to employ an independent contractor to meet said obligations, from public policy or otherwise, then the principle may be conceded. But the propriety of its application must be shown. No obligation of the defendant has been pointed out here inconsistent with having its road graded by an independent contractor." We fail to see any material distinction, in principle, between that case and the one before us. There the statute made the corporation liable for the acts of its agents or employees in causing damage by fire; but the court held, nevertheless, that where the injury was caused by an independent contractor, the corporation was not liable. Here the statute makes the

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independent
contractor.

corporation liable for the carelessness, neglect, or misconduct of its agents and servants in doing the work, but not for the carelessness or misconduct of an independent contractor. In short, the language of the charter making the corporation liable for the negligence of its servants and agents does not apply in this case. It does not include independent contractors, and is merely declaratory of the common law.

The argument *ab inconvenienti*, urged by plaintiff's counsel, while it is doubtless entitled to some weight in the determination of the question at issue, yet is not of sufficient importance to control the decision. We are aware of the fact that much of the work of constructing railroads and other public works, especially in a small state like ours, is done by foreign contractors, and that our citizens having claims against them are sometimes obliged to follow them into another jurisdiction in order to obtain redress. But this is a matter over which the court has no control, and the only way which occurs to us whereby the difficulty may be remedied is by means of such legislation as shall render the corporation that obtains the franchise liable for the negligence or misconduct of the contractor. Demurrer overruled, plea sustained, and case remitted to the common pleas division for further proceedings.

Chicago, B. & Q. R. Co. v. Beatrice Rapid-Transit & Power Co.

CHICAGO, B. & Q. R. CO.

v.

BEATRICE RAPID-TRANSIT & POWER CO.

(*Supreme Court of Nebraska, April 7, 1896.*)

Right to Cross Streets Does Not Confer Exclusive Use of Crossing.—An ordinance authorizing the crossing of the streets of a city by the tracks of a railroad company confers upon the corporation therein named no exclusive use of such crossing, but a use to be enjoyed in common with the general public.

Railroads in Streets.—A railroad company which has, by ordinance, acquired a permanent easement in the streets of a city is not entitled to compensation from a street-railway company as a condition to the crossing of its tracks by the latter, under a grant of power from the city.

ERROR to Gage county district court. *Affirmed.*

John H. Ames, A. Hazlett, and Marquett & Deweese, for plaintiff in error.

J. E. Cobbey, for defendant in error.

POST, C.J.—A question distinctly presented by this record is whether a steam-railroad company, which has, by ordinance, acquired a permanent easement in the streets of a city, is entitled to compensation from a street-railway company as a condition to the crossing of its tracks by the latter, under a grant of power from the city. Adjudications directly in point are by no means numerous, although the question appears, whenever presented for determination, to have been resolved in the negative as an independent proposition, unaffected by the inquiry whether street-car tracks are or are not an additional burden upon adjoining private property.

Railroads in
streets.

In New York, *N. H. & H. R. Co. v. Bridgeport Traction Co.*, (Conn.) 32 Atl. Rep. 953, the identical question was presented upon the application of the plaintiff for an injunction to restrain the threatened crossing by the defendant of its tracks in the city of Bridgeport. In the opinion of the court, reversing the decree below for the plaintiff, this language is

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used: "It is further insisted that these special grants, if otherwise effectual, give the defendant no right to construct the crossing without first making compensation for the direct damage it will do to the plaintiff's property. The injunction was asked to prevent a threatened obstruction of the plaintiff's right of way. It is not alleged or found that it owns the fee of the highway. It has only a right to cross it at grade. The defendant's tracks are laid upon the highway by the authority of the state, and as a highway for public travel. We are not called upon to consider whether electric cars impose any additional burden upon land occupied for a highway, for which the owner of such land can claim compensation. The plaintiff is not in a position to raise that question. It claims that the proposed crossing at Fairfield avenue will affect the safe and beneficial use of its right of way at that point, and thereby impair the general value of its franchises and property. But it holds these subject to the police power of the state, under which the use of highways for all purposes of public travel is fully within the control of the legislature." The supreme court of Indiana, in *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. St. Ry. Co.*, 139 Ind. 297, affirmed a decree of the circuit court restraining the defendant below, a steam-railroad company, from interfering with the construction of the plaintiff's street-car line across its tracks in the city of Hammond. Referring to the question of compensation, it is there said: "Appellant contends that this will be a burden and a hindrance to the free and unobstructed use of the appellant's steam railway, which, it is claimed, is a taking of private property without just compensation, in violation of the constitution. True, it is a hindrance and an obstruction to the use of appellant's steam railway. But, having obtained its right of way, subject to the burden of the easement in the public generally, and the street railway being entitled to the use of that easement, all the rights appellant obtained in the street for its steam railway were subject to the right of the street railway to use the street. In short, the appellant's rights, obtained in the use of the streets for its steam railway, were subject to the burden of the appellee's use thereof, in the ordinary and proper manner, for its street railway. The complaint shows that appellee was only proposing to use the streets at the crossings in the ordinary, and in a proper, manner for the construction of street-railway crossings, and that it

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had been hindered and obstructed therein by the appellant by the use of force. It would, therefore, not be a taking of private property without just compensation, because it does not propose to take from appellant anything it ever owned. It never owned its right of way over and across the street named free from the burden of the public easement, a part of which belongs to the appellee, the street railway." In *Du Bois Traction Pass. R. Co. v. Buffalo, R. & P. R. Co.*, 149 Pa. St. 1, the supreme court approve of an opinion by the common pleas judge from which we quote the following: "There is, therefore, no such injury or damage done to the respondent's rights as are the subject of compensation in damages. The crossing of its track by the passenger railway company gives no greater right to damages, in the view we take of the case, than it would have if the claim was made against an omnibus line." The same question was carefully considered by the supreme court of Illinois in *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, in which it is held that an ordinance of the city of Chicago, authorizing the plaintiff to lay and operate its tracks across certain streets, did not confer upon it an exclusive use of such crossings, but a use thereof to be enjoyed in common with the public; also, that a railroad company, which has acquired a permanent easement in the streets crossed by its tracks, is not entitled to compensation for the crossing of such tracks by a street-railway company, under permission from the city. Such easement being subordinate to the rights of the public, and the use of street cars being a legitimate exercise of the public right, it is in no sense a violation thereof.

There are to be found many cases which rest upon the same principle as the foregoing, and in harmony therewith, but involving controversies between railroad companies or between street-railway companies, claiming superior easements in public streets. See *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.*, 97 Mo. 457; *Highland Ave. & B. R. Co. v. Birmingham U. R. Co.*, 93 Ala. 505; *Market St. R. Co. v. Central R. Co.*, 51 Cal. 583; *Omaha Horse R. Co. v. Cable Tramway Co.*, 32 Fed. Rep. 727. *Calvert v. State*, 34 Neb. 616, cited as opposed to the conclusion announced, is not in point, as that case turned upon an entirely different question. True, the subject here involved was there suggested, although incidentally, as shown

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by the following language of MAXWELL, C.J., in 34 Neb. 632: "Whether the right exists to construct such a track across a network of railway tracks, where trains are being constantly made up, we do not decide, because the question is not presented." The doctrine of the cases cited, and

Right to cross
streets does
not confer ex-
clusive use of
crossing.

which to us appears altogether reasonable and sound, is that a railroad company acquires no exclusive use of streets crossed by its tracks, with the consent of the city or other municipal body, but must enjoy the right so conferred in common with the general public; that it is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interest and necessities; and that any mere inconvenience suffered by it on account of the crossing of its lines by the tracks of street railways by permission of the proper authorities is *damnum absque injuria*.

There are other questions presented by the record, and other sufficient reasons for affirming the decree of the district court, but which, in view of the conclusion above stated, need not be noticed. Affirmed.

ATCHISON, T. & S. F. R. Co.

v.

CHANCE.

(Supreme Court of Kansas, June 6, 1896.)

Jurors.—In the examination of a juror on his *voir dire*, in an action against a railroad company for damages arising from personal injuries, he admitted that he had a feeling against railroads generally, and said that it would require a continual effort on his part to deal with the railroad company in the same way that he would with an individual, and that, perhaps, he could not consider the case in an impartial way. *Held*, that the juror ought to have been excused on the challenge of the defendant for cause.

Question of Fact.—The distance that hand cars running on the same track should be kept apart, under certain circumstances, in order to reasonably protect the men against danger, is a question for the jury to determine, upon evidence of all the facts, rather than by the opinion of a witness.

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Recovery for Mental Suffering.—A recovery may be had for mental suffering or anguish of mind, resulting from physical pain and suffering, endured by the injured party; but it is improper to admit evidence as to mental suffering on account of the circumstances and condition of others.

Value of Time Lost—How Fixed.—In fixing the value of time lost by an adult injured party, it is proper to consider his age, his occupation, and the wages he had earned in the past, in whatever capacity he may have been employed; but the opinions of witnesses as to what he would be capable of earning at vocations in which he had never been employed are inadmissible.

Estimate of Damages.—Where the plaintiff, in an action for damages sustained from personal injuries, dies before the trial from a cause other than such injuries, and the action is revived in the name of his personal representatives, damages for the permanent deprivation of health, and of the capacity to work and enjoy life, should be limited to the period between the injury and the death.

Case at Bar.—The evidence and the answers of the jury to particular questions of fact examined, and *held*, that they justify a verdict and a judgment against the railroad company.

ERROR from Butler county district court. *Reversed.*

On December 1, 1890, John B. Finnegan, one of a gang of men employed by the plaintiff in error to relay its track with steel rails from a distance north of Augusta to that place, was seriously injured by falling off a derailed hand car and being run over by another which was following it. On August 21, 1891, he commenced his action against the railroad company to recover \$20,000 damages by reason of said injury. He alleged that the hand car on which he rode at the time was much worn by long usage and service, and was badly out of repair and unfit for use; that three hand cars were used in transporting the men and carrying the tools from Augusta to the place of doing the work in the morning, and back again in the evening; that it was the duty of the foreman to keep the cars at a safe distance apart, and to place the defective car behind the others, but, in returning from their work that evening, the defective car, on which the plaintiff was riding, was placed in the middle, and the hindmost car was negligently permitted to follow close upon it; that, while propelling said defective car, it came upon a rail that was badly battered, split, and in an unsafe condition, whereby said hand car was derailed, and the plaintiff thrown off behind the same, and run over by the rear car, and he was greatly injured. On October 18, 1891, Finnegan committed suicide by hanging himself, and on December 2, 1891, the

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action was revived in the name of Hattie M. Finnegan as administratrix, she being his widow. The action was tried at March term, 1892, resulting in a judgment in favor of the plaintiff for \$14,806.41; and this proceeding in error was brought to reverse said judgment. Since the case came here, said Hattie M. Finnegan died, and M. T. Chance was appointed in her place as administrator, and the proceeding in error was revived against him.

William Dye was called as a juror, and examined at some length by the respective counsel and by the court. He admitted that he had a feeling against railroads generally, which had existed for several years, and the following questions were propounded to and answered by him: "Q. Would it not require a continual effort on your part to deal with the railroad company in the same way that you would deal with an individual? A. Yes. Q. So believing and so feeling, Mr. Dye, don't you believe that you could not take this case in the same impartial way that you would take a case between two individuals? A. Perhaps not." The plaintiff's counsel resisted the defendant's challenge for cause, and it was overruled by the court. Mr. Dye was afterwards challenged peremptorily, and the defendant exhausted all its peremptory challenges.

Mr. Schroeder was called as a witness for the plaintiff. He had been a section foreman, and over the objections of the defendant he answered questions as follows: "Q. You may state, Mr. Schroeder, what are the duties of a section foreman, in the control of men, in their work in the laying of steel,—taking up of iron rails, and laying of steel ones,—upon the track, where the gang of men go to and from their work on three hand cars. A. To tell them the proper distance to run apart, and instruct them to that effect. Q. Define, now, what other duties would devolve upon the foreman, besides telling them what distance they should run apart. A. To see that his instructions be carried out. Q. What duties would devolve upon him as to the distance the cars should run apart? A. To tell them they should not run any closer than four telegraph poles apart, and explain the dangers, and why." Several witnesses testified to the despondency of Mr. Finnegan during his illness and suffering, and that he was much troubled by the sickness and confinement of his wife, and the fear that he would leave her and the child in a dependent and

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helpless condition. The defendant moved to strike out this evidence as to trouble on account of the wife and the child, but the court overruled the motion. Witnesses were permitted, over the objections of the defendant, to give their opinions as to what Mr. Finnegan would be capable of earning in several different vocations in which he had never been employed.

As to the measure of damages, the court instructed the jury as follows: “ (21) If you find, from a preponderance of the evidence in the case, under the instructions of the court, that the plaintiff is entitled to recover in this action, you may, in determining the amount of her recovery, take into consideration—First, the pain and suffering, physical or mental, if any, undergone by the said John B. Finnegan as a result of the injury; second, the money expended or liability incurred necessarily and reasonably, if any, by the said John B. Finnegan, for medical attendance, as a result of the injury; third, the value of the time lost, if any, by the said John B. Finnegan, as a result of the injury; fourth, the disability or diminished earning capacity, whether total or partial, temporary or permanent, incurred by the said John B. Finnegan as a result of the injury. And from these elements, or so many of them as you find are established by a preponderance of the evidence, assess the amount of plaintiff’s recovery at a sum which you believe would fairly and justly have compensated the said John B. Finnegan for the injury sustained.” After the jury had been in consultation during a day and a night, they were permitted to come into court, when they asked the following question: “ In estimating damages for permanent injury, if any, is the time limited to actual lifetime of injured? ” The court, in answering this question, concluded as follows: “ You cannot allow plaintiff anything for the loss of the support and sustenance of her husband. If you find for the plaintiff, the question for you to determine is: what would have been a fair and just compensation for said Finnegan for the injuries sustained? What ought he fairly to have received for each and all the elements of damages mentioned in instruction No. 21, which you may find sustained by the evidence, including any permanent disability sustained by him? And, in estimating damages for permanent injury, you are not limited to the time said Finnegan actually lived.”

The verdict of the jury was made up of the following items:

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Doctor's bill, \$861; mental suffering and anguish, \$4,000; physical suffering, \$6,000; loss of service from the time of the accident until death, \$350; permanent injury, \$3,595.40. And the last item was explained by the following question and answer: "For what length of time do you allow in estimating damages for permanent injury? A possibility of from 10 to 20 years." The defendant moved for judgment in its favor on the answers of the jury to the particular questions of fact submitted to them, notwithstanding the general verdict, and the defendant further moved for a new trial, but these motions were overruled.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error.

George Gardner and N. A. Yeager, for defendant in error.

MARTIN, C.J. (after stating the facts).—1. The court erred in overruling the defendant's challenge for cause of William Dye as a juror. He seems to have been fair and straightforward in answering the questions of court and counsel, and he might have been entirely fair in the consideration of the case; but, as he felt that it would require a continual effort on his part to deal with the railroad company in the same way that he would with an individual, and that, perhaps, he could not consider the case in an impartial way, it was the duty of the court to excuse him. A juror may be challenged "on suspicion of prejudice against or partiality for either party" (Civ. Code, § 270); and where the trial judge is in doubt as to the impartiality of a juror, a challenge for cause should be sustained (*Railway Co. v. Munkers*, 11 Kan. 223, 232). The defendant having exhausted all its peremptory challenges, the error will be considered material although the juror was afterwards discharged on peremptory challenge. *State v. Vogan*, 56 Kan. 61, 63, and cases cited.

2. The quoted testimony of Mr. Schroeder was somewhat objectionable, notwithstanding the liberal rule, adopted by this court in *Railway Co. v. Mackey*, 33 Kan. 298, as to the duties of persons engaged in a particular employment. It does not appear that Mr. Schroeder had ever been foreman of a gang of men engaged, like this, in relaying a track, and using several hand cars in their work. Besides, it was a ques-

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tion of fact, for the jury to determine, as to the distance that the hand cars should be kept apart, so as not to be a source of danger to the men riding upon them; for a safe distance would vary with the speed of the cars, and the grade and condition of the track, and would not, necessarily, be "four telegraph poles" at all times. The admission of this evidence, however, would not require a reversal of the case, for the evidence shows that the hindmost car was within 15 to 30 feet of the middle one at the time of the derailment of the latter; but, as the case must be retried, we have deemed it best to call attention to the error in the admission of this testimony, in order to guard against its repetition.

Question of fact.

3. The court erred in refusing to strike out the testimony to the effect that Finnegan was troubled by the sickness and confinement of his wife, and the fear that he would leave her and the child in a dependent and helpless condition. Under the decisions of this court, a recovery may be had for mental suffering or anguish of mind resulting from physical pain and suffering endured by the injured party; but it is improper to admit evidence as to mental suffering on account of the circumstances or conditions of others. *City of Parsons v. Lindsay*, 26 Kan. 426, 435; *City of Salina v. Troster*, 27 Kan. 544, 564; *West v. Telegraph Co.*, 39 Kan. 93, 99. The sum awarded for mental suffering, which was liberal, may have been enhanced by the admission of this incompetent testimony; and we cannot hold that the error in its admission was not prejudicial to the defendant.

Recovery for mental suffering.

4. In fixing the value of the time lost by Finnegan from the date of his injury until his death, it would be proper for the jury to consider his age, his occupation, and the wages which he had earned in the past, in whatever capacity he may have been employed. The opinions of witnesses, however, as to what he would be capable of earning at vocations in which he had never been employed, were clearly inadmissible. *Railroad Co. v. Newton*, 85 Ga. 517, 526. This is also an error for which the court would not reverse the judgment, as the allowance for loss of time was not substantially different from the amount shown by competent evidence.

Value of time lost—How fixed.

5. Instruction 21 was somewhat vague and uncertain as to

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the fourth element of damages, and it was this, no doubt, that caused the inquiry of the jury as to whether damages for permanent injury were limited to the actual lifetime of the person injured; and this called forth the further instruction of the court that such damages were not limited to the lifetime of Finnegan. In the answer of the jury to the particular question of fact regarding the length of time taken into consideration as a basis for an estimate, the jury evidently had regard to the expectancy of the life of Finnegan, although no

Estimate of Damage. evidence was introduced upon the subject. We think, however, that such evidence would not have been admissible; for expectancy is only to be resorted to in the absence of certainty, and, as the life of Finnegan was terminated before the trial, there was no basis for an estimate of damages extending beyond that period. Damages for the permanent deprivation of health and of the capacity to work and enjoy life should therefore be limited to the period extending from December 1, 1890, to October 18, 1891. Busw. Pers. Injur. § 20.

6. The court did not err in overruling the motion of the defendant for judgment in its favor notwithstanding the general verdict. It is true that Finnegan assumed the ordinary risks of the employment in which he was engaged, and all defects in the hand car and in the track of which he had knowledge, or which, in the exercise of ordinary care, should have been known to him. The upright of the hand car had been broken, and was mended only in a temporary way. This was a patent defect, of which Finnegan must be held to have known; but it was not even a contributing cause to the derailment. The worn condition of the cog-wheels and of the flanges was not so obvious. The active duty of inspection was not incumbent upon Finnegan, and therefore it was a question of fact, for the jury to determine, whether he, in the exercise of ordinary care, should have discovered that the hand car was unsafe and unfit for use in these respects. Finnegan was not a section man engaged in repairing the track. He and his co-laborers were taking up the old track, and laying down new steel rails. The road was in operation, and Pat Lynch was the section foreman, whose duty it was to keep the track in a reasonably safe condition until the new steel rails were laid down. He testified that he knew of this particular defective rail for two

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weeks prior to the injury. Finnegan had no opportunity of examining this rail, or any other, except in passing over the track, on the hand car, going to and from his work. The evidence shows that many of the iron rails were battered and worn, but the particular one where the derailment occurred was unusually bad. It was also a question for the jury to determine whether Finnegan was guilty of negligence or not in running over this bad rail to and from his work without objection. Hare, the foreman of the steel gang, testified that it was dangerous to run the cars at a less distance than a telegraph pole, or 180 feet, apart; yet he must have known that, on this occasion, the three cars were running quite near to each other, and the men on the hindmost car certainly knew that they were very close upon the middle car, and Finnegan was powerless to prevent this, except by running faster, which would involve the first car in danger. The evidence and the particular findings of fact justify a verdict in favor of the plaintiff. Finnegan, who was only 29 years of age, was left a physical wreck by the injury, so that life was changed from a pleasure to a burden, which he perhaps chose to lay down rather than longer to bear, and, except for the large allowance for permanent injury, we cannot say that the verdict is excessive.

The defendant in error challenges the sufficiency of the record to present the errors complained of, but we think that, by a liberal interpretation, the record must be held sufficient. The plaintiff in error presents some further questions, but we think they are without substantial merit. On account of the errors hereinbefore mentioned, however, the judgment must be reversed, and the case remanded for a new trial. All the justices concurring.

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COULTER

v.

GREAT NORTHERN RY. Co.

(Supreme Court of North Dakota, June 5, 1896.)

Negligence—Variance between Pleading and Proof.—There is no fatal variance between pleading and proof where the complaint alleges that plaintiff was injured through defendant's negligence at a crossing of the public highway over defendant's railroad track by being there struck by one of defendant's engines, and the evidence shows that the highway was not legally laid out over defendant's right of way, but that defendant, by its acts and its acquiescence in the public use of the crossing as a public highway, had made such crossing a public highway as to the public, so that it was under the same obligations to take precautions against injuring persons or property at that point as would have rested on it had the highway been laid out in strict conformity with law.

Crossings—Degree of Care to be Observed by Railroads.—The statutory provision of the state regulating the ringing of the bell and blowing of the whistle on approaching a public crossing is not the sole measure of the duty of a railroad company to protect persons and property at public crossings. Nor do regulations embodied in ordinances passed by city councils under statutory authority, regulating the speed of trains and the giving of signals at public crossings within city limits, constitute the sole criteria of the care to be used by such corporations in the management of their trains. The common-law obligation resting upon such corporations to use proper care in the operation of their trains to protect persons and property is not diminished by such statutory provisions or ordinances.

Power of Judge to Settle Bill of Exceptions.—The district judge has power to settle a bill of exceptions after an appeal has been perfected, when the original record in the case is still in the district court.

APPEAL from Grand Forks county district court. *Reversed.*

Bangs & Fisk and *Tracy R. Bangs*, for appellant.

W. E. Dodge and *Burke Corbet*, for respondent.

CORLISS, J.—From a judgment in favor of the defendant, based upon a verdict directed by the court after the plaintiff had rested, the appeal was taken which brings this case before us. The action was for damages for personal injuries received by plaintiff by being struck by one of defendant's locomotives which was drawing a passen-

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ger train on defendant's road. The accident occurred at a public crossing in the city of Grand Forks, in this state. Plaintiff was driving a team upon one of the streets of that city, and as he was attempting to cross the railroad track at the point where such street was carried over the track a moving train collided with him, causing injuries which necessitated the amputation of one of his legs. The case developed by him on the trial was sufficient to sustain a verdict in his favor. It appeared that the defendant had recognized the crossing in question as the crossing of a public highway over its track. The street leading up to the defendant's right of way on each side thereof was known as "Ione avenue." When originally laid out, it did not cross such right of way, but merely abutted thereon on either side. The reason for this was that the person who platted the land on which this avenue was laid out had no control over the defendant's right of way, which already had been established at that point. This plat was made in 1882. But there was evidence in the case tending to prove that Ione avenue had been graded over the defendant's right of way the same as elsewhere, and that it had been used as a public thoroughfare for eight or ten years. It appeared that the street commissioner of Grand Forks city in 1890 and 1891 had done work on that portion of the street on defendant's right of way leading up to the crossing, and that defendant had not interfered with such work, or in any manner objected to its being performed by the municipality in the exercise of its control over the public streets of the city. There was also testimony that men had been seen working on the crossing itself, and the inference that these men were in the employ of the defendant is fully justified by the evidence of the section foreman of that section of the road. He testified as follows: "Am about 30 years of age. Lived in Grand Forks 15 years. Have been in the employ of Great Northern Railway as section foreman. Know where Ione avenue, in city of Grand Forks, crosses tracks of the Great Northern Railway Company. That portion of the track was in my section as section foreman. As such foreman, and while in the employ of the Great Northern Railway Company, under direction of superior officers, I have repaired the railroad crossing at Ione avenue by putting in planks where they were worn out or broken, so as to make it passable for teams. The last time I repaired it was about four years ago. I

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worked on the road which I supposed was the Great Northern. That is the extent of my knowledge." It seems to be undisputed that for about three years there had been at this crossing a sign announcing that the place was a railroad crossing. There is no direct evidence that the defendant erected the sign board, but under the facts of the case the jury would have been justified in finding that this was the fact. It is evident from this brief review of the case proven by the plaintiff that the jury would have been warranted in reaching the conclusion that the defendant had invited the public to use this crossing the same as the crossing of a legally established highway over its track. To the traveler upon the highway the street at this point presented all the appearances of a lawfully established highway, and all these appearances the jury would have been justified in finding that the defendant was responsible for. They might have found from the evidence that it had erected the usual sign board warning the public that there was a railroad crossing at that place; that it had put in and had kept in repair the necessary planking to enable vehicles to pass over the track, and that it had permitted the public to use for several years this crossing as though it was the crossing of a legally laid out highway over its right of way. Under these circumstances it owed to the plaintiff, at the time he was struck by its engine, the same duty of using ordinary care to protect him it would have owed him had the highway been legally established over its right of way at this point. *Kelly v. Railway Co.*, 28 Minn. 98, 6 Am. & Eng. R. Cas. 264; *Lillstrom v. Railway Co.*, 53 Minn. 464; *Railroad Co. v. Metcalf*, (Neb.) 63 N. W. 51; *Cranston v. Railroad Co.*, (Sup. Ct.) 11 N. Y. Supp. 215, *affirmed in* 26 N. E. 756 by the court of appeals; *Railroad Co. v. Lee*, 70 Tex. 496; *Barry v. Railroad Co.*, 92 N. Y. 289; *Sweeny v. Railroad Co.*, 10 Allen 368; *Taylor v. Canal Co.*, 113 Pa. St. 162-175, 28 Am. & Eng. R. Cas. 656; *Byrne v. Railroad Co.*, 104 N. Y. 362; 2 Shear. & R. Neg. § 464; 1 Thomp. Neg. 416; *Webb v. Railroad Co.*, 57 Me. 117. See, also, *Bishop v. Railway Co.*, 4 N. Dak. 540. We do not care to go so far in this case as to hold that the statute relating to the ringing of the bell or the blowing of the whistle at a railroad crossing applies to the case of a crossing where there is no legally established highway, but only a highway in fact. However, there is strong authority to support this view. See *Railway*

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Co. v. Dillon, 123 Ill. 570, 32 Am. & Eng. R. Cas. 1; *Id.*, 24 Ill. App. 203; Railway Co. v. Metcalf, (Neb.) 63 N. W. 51; Railway Co. v. Lee, 70 Tex. 496. But see Reynolds v. Railway Co., 69 Fed. Rep. 808. All we are required to decide in this case is that the facts established by the plaintiff were sufficient to carry the case to the jury and sustain a finding by them that the defendant had failed to discharge to the plaintiff the common-law duty of exercising ordinary care which it owed him when he attempted to use this crossing which the defendant had invited the public generally to use. Having created the appearance that the crossing in question was a portion of Lone avenue, that such avenue passed entirely over its right of way, and having suffered the public for several years to act upon such appearance, it would be a monstrous doctrine that it could claim that it owed the plaintiff no common-law duty while he was using this very crossing it had assured him he could use as a public highway crossing. No authority can be found to sustain such a rule of law. Indeed, it is not contended here by the defendant that the plaintiff did not make out a sufficient case of negligence against the defendant to warrant a verdict in favor of the plaintiff. But it is urged that the plaintiff did not establish the cause of action set up in his complaint. The question before us is a question of variance. One cause of action, it is contended, was relied on in the pleading, and an entirely different one was proved on the trial, and this, too, against objection on the specific ground that the evidence was not within the issues. The case before us does not present those features which, when they exist, make it the duty, even of the appellate court, to amend a pleading to conform to the proof. The evidence to which we have referred was objected to on the ground that it did not tend to prove the case set forth in the complaint. The learned trial judge intimated to the plaintiff at the very commencement of the trial that he thought that plaintiff was upon dangerous ground, and that he would regard it safer for plaintiff to amend, and he offered to allow the necessary amendment to be made. But the plaintiff elected to stand upon the complaint as originally framed. It is thus apparent that the learned trial judge acted with the utmost fairness, and if we should be compelled, under the law, to affirm the judgment, the plaintiff's counsel would have only their own temerity to blame for the result.

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In determining whether there was a variance between the averments of the complaint and the evidence adduced on the trial it is necessary to refer now to the allegations of that pleading. The portions of it material to this question are as follows: "That on the 19th day of November, 1894, within the limits of the city of Grand Forks, at a point where the defendant's railroad crosses Ione avenue, said avenue being a public highway, and in constant use as such, this plaintiff was lawfully attempting to drive his team of horses and wagon across the track of said railroad, when defendant's agents and servants carelessly and negligently ran a locomotive engine and train of cars upon said wagon, thereby injuring plaintiff, who was seated on said wagon, by violently throwing him out and against the cow-catcher attached to said locomotive and upon the ground with such force as to break, bruise, and mangle his left leg, from the effects of which injury, and as a result thereof, it was thereafter necessary to have said leg amputated, which was done in the month of March, 1895." "(3) That by reason of the facts aforesaid plaintiff has suffered great pain, and is permanently injured, maimed, and crippled for life; that he was confined to his bed by reason thereof continuously from the date of such accident until on or about the 18th day of April, 1895, and was compelled to and did expend by reason thereof the sum of two hundred dollars (\$200) for medical attendance. (4) That said train was running at a dangerous, reckless, negligent, and unusual rate of speed at the time it struck said wagon, to wit, at the rate of thirty miles an hour; and when approaching the said crossing defendant's servants and employees in charge negligently failed to give any signal or alarm by ringing the bell or blowing the whistle or otherwise, and never attempted to check or stop said train; that said injuries were caused by the careless and negligent acts of the defendant, as above stated, and without negligence on the part of this plaintiff. (5) That by reason of said injuries plaintiff has suffered damages in the sum of twenty thousand two hundred dollars (\$20,200.00)." It is apparent that the pleading is not framed with reference to the statute requiring the ringing of the bell or the blowing of the whistle at crossings. The statute is not referred to. There is no averment touching the statutory duty of railroads in such cases. The whole tenor of the complaint is against the idea that the

Negligence—
Variance be-
tween plead-
ing and proof.

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plaintiff was proceeding on the narrow theory of liability from violation of a statutory provision. The plaintiff was seeking to recover damages for negligence, and we would naturally expect him to so draw his complaint as to embrace the widest possible theory on which defendant could be held responsible. We cannot infer that he deliberately intended to waive his right to insist upon the discharge by defendant of its common-law duty to him to use ordinary care to protect him against injury at the crossing it had invited him and others to use. On the contrary, the complaint shows that he intended to hold defendant strictly to this common-law duty it owed him. The allegations of the complaint are not limited to the fact of the failure to ring the bell or blow the whistle. The pleading distinctly sets forth that the defendant failed to give any signal or alarm by ringing the bell or blowing the whistle or otherwise; and it contains the further averment that the train was being run at a negligent, dangerous, unusual, and reckless rate of speed. As we construe the pleading, it sets forth the common-law duty of the defendant to exercise ordinary care at a public crossing, and its negligent discharge of such duty. At the trial such a cause of action was made out. There was, therefore, no variance between the pleading and the proof. In *Railway Co. v. Dillon*, (Ill. Sup.) 15 N. E. 182, the same question was involved. The court said: "It is finally urged, with great persistence, that the avenue in question is not, within the meaning of our statute, a public highway, and that, as the action is based exclusively on the statute, the failure to ring a bell or sound the whistle was violative of no duty which it imposes, and hence no cause of action is shown. We do not concur in this view. It is to be observed, in the first place, this is not a statutory action to recover the penalty which the statute prescribes for a failure to give such a signal. If it were, quite a different question would be presented. The present is a common-law action, brought for the failure to perform a duty imposed by law. Under the facts disclosed by the record, we do not think it essential to the maintenance of the action that this duty should necessarily arise under the statute, notwithstanding the pleader possibly may have so regarded it in framing the declaration. Without regard to the statute, it is the duty of those having charge of trains to give notice of their approach at all points of known or reasonably apprehended danger. This is almost universally done by the

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ringing of a bell or sounding of the whistle, and frequently both. In exceptional cases, where the highest degree of care is deemed advisable, flagging is resorted to. That these duties are enjoined by the common law is not disputed, but the claim is, as already seen, that the action is brought upon the statute, and that the plaintiff, therefore, cannot avail himself of his common-law rights, although the averments in the declaration are otherwise broad enough for such purpose. This, as we view it, is an entire misapprehension of the whole matter. As before indicated, the action is not brought on the statute, nor does it purport to be. While there are certain expressions in that part of the declaration which attempts to define the duty of the defendant, justifying the inference that the pleader had the statute in his mind, yet there is really nothing in it that can properly be called even a reference to the statute. Even the expressions referred to as showing the drift of the pleader's thoughts are entirely superfluous and uncalled for, and may, therefore, be treated as surplusage. As mere matter of composition, tending to perspicuity, such averments are admissible, and even commendable, if not misleading. * * * Even if the declaration in this case contained a direct reference to the statute, and it was evident that the pleader expected to rely exclusively upon it, still it would not, in our opinion, present an insuperable obstacle to a recovery on common-law grounds, if the allegations otherwise were sufficiently broad, and the evidence warranted it. In a note to Oliv. Prec. 528, where this subject is under discussion, we find the following: 'So, also, where the action is sustainable at common law, and the declaration concludes against the statute or statutes,' etc., and the statutes have been misquoted or incorrectly referred to, or there is no statute in fact in relation to the subject, those words in the declaration shall be rejected as surplusage, and the action shall be maintained at common law. See Galt, 212; Com. Dig. 'Action upon Statute,' (C.). The general principle here announced fully answers the contention of appellant."

The complaint pointed out the precise location of the accident, and in this respect the evidence conformed to the allegation. It is only because the plaintiff employed in his complaint the words "public highway" that it is here urged that there is a fatal variance. It is said that a strictly legal public highway was not established, but that, on the contrary,

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it was conclusively shown that there was in that sense of the phrase no public highway where plaintiff was injured. But it was not necessary to show a strictly legal highway to make out a case within the complaint. Plaintiff's right to recover damages did not depend upon there being a legally established highway at that point. All that it was necessary for him to prove was the fact that with respect to its duty to him the defendant owed him the same measure of care at this point that it would owe him at a legally laid out public highway; that with regard to its duty to him the crossing was in all respects the same as the crossing of a lawful public highway. The plaintiff in fact proved as to the defendant that there was a public highway at this point. It was in all respects a public highway for the purposes of fixing the extent of defendant's duty to plaintiff at this crossing. Whether it was a highway in any other sense or for any other purpose was immaterial. This is not an action brought for the purpose of determining whether there is a legal highway at the place where plaintiff was injured. All he is required to prove in this case is that there was in fact a highway at this place as to plaintiff and the public. The defendant could not possibly have been misled. The exact locality was pointed out in the complaint. Defendant was notified by that pleading that the plaintiff would claim on the trial that the crossing was, as to defendant, a public highway for the purposes of determining the scope of defendant's obligation with respect to the precautions to be used to protect him from injury at this place. Whether it was a public highway for any other purposes it was unnecessary to prove, for such proof would not have increased one particle the obligation of the defendant to protect plaintiff from harm at this point. It is unjustifiable to place upon the words "public highway" such a meaning as will indicate a purpose on the part of the pleader to restrict himself in the proof of his cause of action. Where a railroad company has invited the public to use a crossing as part of a public highway, such crossing is, as to it, in all respects the same as a strictly legal public highway. In the language of some of the decisions the company is estopped from asserting the contrary. See *Railway Co. v. Lee*, 70 Tex. 496. When, therefore, the pleader refers to the crossing as a public highway crossing, the allegation is that, with respect to the defendant's duty to the public generally and to the plaintiff in particular, it

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was a public highway, and not merely that it was in all strictness a legal public highway. When these words are employed in a complaint, they must be interpreted in the light of the rule that the railroad company is liable if there is in fact a public highway at the point, just the same as though the highway had been legally laid out. Language in a pleading must have a reasonable construction. It is certainly a reasonable construction to attribute to the plaintiff, by the use of such words, a purpose to set forth the broadest claim he can make against the defendant, when the courts themselves employ such words to designate a highway which, while not legally laid out, a railroad company, by its conduct or acquiescence, has made in all respects a legal public highway for the purpose of measuring the extent of its obligations to the public. Nor will any injustice result to railroad companies under the rule of construction we here enunciate. If the precise locality is pointed out in the complaint, the defendant will never be surprised by evidence proving not a strictly legal highway, but only a highway as to the defendant with respect to his duty to the plaintiff. The exact place being designated, the defendant can always ascertain the facts, and be prepared to meet, so far as they can be met, all theories on which can be predicated the claim that with respect to its duty to the plaintiff the crossing was in the eye of the law a public highway. *Webb v. Railroad Co.*, 57 Me. 117. In that case the complaint alleged that the plaintiff was injured while passing along "a public street and highway." The question of variance was before the court. On this point the court said: "And, even if the evidence fell short of establishing a highway *de jure*, we think that upon the issue presented by these pleadings, and upon the state of facts exhibited by this report, a variance in this particular would be an immaterial one, not affecting the rights of the parties or the rules of law or evidence applicable in the trial of the cause, or the inferences to be drawn from the testimony, in any manner. Here was an avenue through which poured the whole tide of travel into and out of the city in that direction, affording the most direct route to the defendants' freight depot and grounds; used and recognized by all and sundry as a highway for years before the defendants began to run over the track of the P., S. & P. Railroad, located there." The court further remarked: "That it was not for the defendants to

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say in this action that there was no highway there if there was a crossing which they and all others interested permitted the public to use as such, and which was, in fact, in great and constant use. Under such circumstances the plaintiff would be there with the rights of a traveler on a highway, and, as regarded him and all others traveling there, the defendants would be subject to the same duties and liabilities as if the street had been a highway *de jure* as well as *de facto*. As regards the issue which these parties were litigating then, a variance of this description, were its existence demonstrated, would be immaterial. The defendants, upon this point, rely upon the case of *Shaw v. Corporation*, 8 Gray 45. We do not question the correctness of that decision as to the materiality of the variance in that case. The variance between the declaration and the proof as to the place of the accident, changing it from the highway to a point without the limits of the highway, on the defendants' grounds, would necessarily change the whole course of inquiry, and affect all the inferences to be drawn as to the suitability of the horse, the degree of skill and care in driving exercised by the plaintiff, and other matters vital to the plaintiff's suit. The reasons assigned for holding the variance to be in that case radical and essential do not exist here. It mattered not (if the plaintiff was at the place of the accident with the rights of a traveler on a highway, and the defendants were there subject to the duties and liabilities of a railroad crossing a highway at grade, as was assuredly the case upon the testimony adduced here) whether there was or was not error in the proceedings of the county commissioners a dozen or fifteen years before. When all parties were proceeding upon the hypothesis that there was no error, it would not change the relations of the parties in this suit to each other should it be found that all were mistaken in that particular." In *Kelly v. Railroad Co.*, 28 Minn. 98, 6 Am. & Eng. R. Cas. 264, the allegation was that plaintiff was injured where the defendant's road intersected a highway. This word "highway" is the equivalent of the words "public highway." A highway is not a highway unless it is public. The court held that under such a pleading evidence was competent which proved that defendant had recognized the crossing as a highway, and had permitted the public to treat it as such for years. The court said: "Defendant also took exception to the ruling of the

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court admitting evidence tending to show that the *locus in quo* had been opened, worked, and traveled continuously for ten years as a highway. This was competent evidence tending to prove the existence of a highway by common-law dedication. But the evidence was admissible upon still another ground. Even if this was not a legal highway, yet if it was openly and notoriously used as such by the public, and the defendant recognized it as such by permitting the public to use it, and by assuming to maintain a crossing at that point, they would be bound to exercise precisely the same precautions to keep it in repair as if it was in fact a legal highway. *Webb v. Railroad Co.*, 57 Me. 117."

The chief contention made by counsel for defendant both here and in the court below was that plaintiff had alleged a public highway, which would, so far as statutory provisions were concerned, be governed by the general statutes requiring the ringing of the bell or the blowing of the whistle; but that he had proved a street within a city having control over the general subject of the regulation of the speed of trains and the giving of crossing signals within the city limits, and that, because such control had been delegated by the legislature to the governing body of such city, the general statutes were repealed as to all streets within such city, leaving the matter to such regulations as should be prescribed by the city council. The view we take of this case renders it unnecessary for us to express any opinion on this very interesting question. Whatever regulations have been established by the legislature or by

Crossings—
Degree of care
to be observed
by railroads. the city council of Grand Forks, and whether those found in the general statutes or those embodied in city ordinances are the regulations which apply to the street in question, it nevertheless is true as a proposition of law that the common-law duty of the defendant to the plaintiff was not thereby diminished in the slightest particular. It is not competent for the legislature, much less for a city council, to declare what shall constitute ordinary care in every case, irrespective of the peculiar circumstances of each case. Nor has the legislature attempted to do so, or to authorize the city council of Grand Forks city to do so. It has fixed a minimum duty by statute. Under the authorities, failure to discharge this statutory duty is evidence of negligence. Indeed, many of the cases hold that, if the statutory duty is not performed, negligence is conclusively

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made out. The legislature has also authorized municipal corporations to pass ordinances regulating the duties of railroads to the public within city limits. But back of all these regulations lies the question whether in each case proper care was exercised by the railroad company under the facts of the particular case. This is a judicial question. It is a question to be settled in each case in the same manner in which it would be settled were there no statutory or other regulations whatever on the subject, with the single qualification that failure to comply with the provisions of statute or ordinance on this subject (whichever may be applicable) would be evidence of negligence,—perhaps conclusive evidence. That statutory or other regulations do not diminish the common-law duty is well settled. *Railway Co. v. Netolicky*, 67 Fed. Rep. 665; *Railway Co. v. Ives*, 144 U. S. 408-420, 55 Am. & Eng. R. Cas. 159; *Shaber v. Railway Co.*, 28 Minn. 103, 2 Am. & Eng. R. Cas. 185; *Thompson v. Railroad Co.*, 110 N. Y. 630; *Vandewater v. Railroad Co.*, 135 N. Y. 583; *Railroad Co. v. Hague*, (Kan. Sup.) 38 Pac. Rep. 257; *Railroad Co. v. Perkins*, 125 Ill. 127; *Winstanley v. Railway Co.*, 72 Wis. 375; *Guggenheim v. Railway Co.*, 66 Mich. 150. These cases all hold that regulations by ordinance or statute of the speed of trains and of the giving of signals at crossings have no effect to exempt railroads from the employment of other means to protect persons and property at crossings when the exercise of due care requires the employment of other means. We might, for the purposes of this case, assume that all the statutory provisions on the subject of ringing the bell and blowing the whistle on approaching crossings were abrogated as to all streets within the city by the grant of power to the city council of Grand Forks city to legislate on the subject; and we might further assume that the council had failed to exercise this power, and yet it would be just as true that the common-law obligation resting on the defendant to use due care to protect persons and property at this crossing would be in force the same as though the general statutory provisions were applicable to this particular crossing. So far as the common-law duty is concerned, it is immaterial what regulations govern. Nor is it at all important whether there are any regulations whatever on the subject.

We have investigated the defendant's contention that plaintiff's contributory negligence was established as a matter

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of law by the evidence he adduced. We are unable to reach this conclusion. That question was, under the evidence, a question of fact for the jury. It would be a needless expansion of this opinion to set forth here the evidence bearing on this point.

A question of practice remains for consideration. Before the argument of this case on the merits the defendant's counsel moved to strike out the bill of exceptions on the ground that it was settled by the district judge after the appeal had been perfected. Notwithstanding the very ingenious

**Power of judge
to settle bill
of exceptions.**

argument of defendant's counsel, we are clearly of opinion that the court had power to settle the bill, although the appeal had been perfected. The act of settling a bill is not the taking of a new step in the case. It is merely the gathering up and bringing upon the record of facts which would not otherwise appear upon the record. The settlement of a bill is in furtherance of the intelligent exercise by this court of its powers of review. Without such a bill the case could not be reviewed on its merits. By settling a bill, the trial judge does not assume to perform any new judicial act in the case which can in any manner affect the decision appealed from, or to alter in any manner the condition in which the case stood at the time the appeal was taken. He merely embodies in authentic form a record of the proceedings already had, and on which his previous judicial action was predicated, to the end that the appellate court may determine whether such previous judicial action was legal or erroneous. All the adjudications seem to support our view that the trial court had full authority to settle the bill after the appeal had been perfected. *James v. Leport*, 19 Nev. 174; *Flynn v. Cottle*, 47 Cal. 527; *National City Bank of New York v. New York Gold Exch. Bank*, 97 N. Y. 645; *Colbert v. Rankin*, 72 Cal. 197; *Luyster v. Sniffen*, 3 How. Pr. 250; *State v. Town Board of Sup'rs of Delafield*, 69 Wis. 264; *Hunnicut v. Peyton*, 102 U. S. 333. In the case of *Moore v. Booker*, 4 N. Dak. 543, we practically recognize this power as existing in the district courts, but we there held that, where the original record has been transmitted to this court, the trial judge cannot amend a bill of exceptions without having the record sent back to him, that he may have before him the bill he desires to amend. In that case, too, the application was not to settle a bill before

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argument in this court, but to amend a bill already settled, but not before the trial judge, and this, too, at a time subsequent to the argument of the case on the merits. The case did not disclose the fact that the party applying for the amendment might not, by the exercise of reasonable diligence, have ascertained the error in the bill at the time it was originally settled, or at least before final argument in this court. After a case has been submitted to this court on the merits, and the work of investigation has commenced, parties will not be allowed the privilege of amending the record except on condition of making a very satisfactory showing, and that showing must be made in this court, and this court will in all such cases determine whether, under the circumstances, the record should be sent back for correction. Such belated applications result in delay to the adverse party, whose rights and interests are not to be ignored in passing on the question whether he shall be subjected to the delay and expense consequent upon the remanding of the record for amendment; such remanding of the record for amendment usually necessitating a continuance of the case to the next term, and a new argument at that term upon, perhaps, an entirely different record. We think the trial judge had full power to settle the bill notwithstanding the fact that the appeal had been perfected, the original record in the case still being in the district court. But for the error already alluded to the judgment is reversed, and a new trial is ordered. All concur.

BLAND *et ux.*

v.

SHREVEPORT BELT-RY. CO.

(*Supreme Court of Louisiana, June 15, 1896.*)

Notice of Defect.—The lineman of the defendant company, in the discharge of his duty, was ordered to take down a guy wire from an electric pole and guy tree. The pole had not been securely planted. It fell on the lineman, inflicting injuries of which he died. The vice of construction was latent and concealed. The officers of a preceding board of management had been notified of the defect. The company is not relieved under the plea of want of notice, although the present gen-

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eral manager had not been notified, but the preceding manager or superintendent.

Assumption of Risk.—The lineman did not voluntarily place himself in a dangerous position.

Employee Not Bound to Know Latent Defects.—The employee is not bound to know latent, but only patent, defects.

Duty of Master as to Appliances.—The master must provide suitable appliances.

APPEAL from parish of Caddo, judicial district court.
Modified and affirmed.

Wise & Herndon, for appellant.

Leonard & Randolph, for appellees.

BREAUX, J.—The plaintiffs claimed damages for the death of their son, Charles M. Bland, aged about 22 years, and unmarried. He was electrician and lineman, the witnesses state, of the defendant company. The latter
Case stated. operates a belt-line electric railway in the city of Shreveport. The electricity is supplied through a trolley wire hanging over the roadbed by means of suspension wires fastened to poles standing on each side of the road. The height of these poles is about 25 or 30 feet, and their diameter 8 or 10 inches. On a straight line these poles are planted at a depth of about five feet, on curves about five feet and a half. It became necessary to take down a guy wire attached to one of these poles on a curve. The superintendent of the company with the lineman, the late Charles Bland, went to the pole to remove the wire. The former suggested to the latter to cut the wire from or to let him cut it from the tree. "No," was the latter's reply, for the reason that "the wire will remain attached to the pole, and will be in the way." The superintendent also offered to climb the pole, and himself do the work required. The lineman, being more active and nimble, went up after the soundness of the pole had been tested. Reaching the point at which the guy wire was attached to the pole, he clipped the wire with his pliers. Immediately after, the pole commenced to give way with the young man, and fell on him. He died about seven hours afterwards from the effects of the fall. It is in evidence that the pole was two feet in the ground, that the ground was wet at the time, as it had rained the previous day. The defendant pleads that the accident was caused by the lineman's want of care and caution; that he was aware of the danger of

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the employment. The jury found a verdict for the plaintiffs in the sum of \$2,500. After an ineffectual attempt to obtain a new trial from the verdict, the defendant appeals from the judgment. Before the guy wire was removed, the offending pole was safe. It remains, none the less, that without this wire it was entirely unsafe. We have seen that moving the wire was a necessity, rendered so by the fact that the guy tree was on the right of way of another railroad. The removal was ordered by the defendant company under whose order the two—its superintendent and lineman—acted. The company's order was to take down the wire, and take it out of the way. It is well settled, in order to support an action for personal injuries, two things must concur: the want of proper care and caution on the part of the defendant, and no fault on the part of the plaintiff. If the defendant was notified of the vice of construction at the place the accident occurred, and failed to make needful repairs within a reasonable time, it became responsible for injuries resulting from the fall of the pole. It is but fair to the present management to state that it does not appear of record that they had any knowledge of the defect. Notice of defect.

It is in evidence, however, that in 1893 the one who was lineman of the company reported to the superintendent that this pole was weak, threatening, and that it needed resetting. These employees are no longer in the service of the company. The corporation itself has not changed, and it is bound by the knowledge its employees at the time had. Notice to the agent was notice to the principal. We are informed by the testimony of the witness Huddleston that the superintendent's reply was (when he was notified) that the pole would be reset later, in dry weather. It was in wet weather that he gave the information and was directed to attach the guy wire. If this witness has stated correctly,—and we have no reason to think that he has not,—the resetting should not have been indefinitely postponed as it was.

Having reached this conclusion in regard to the defendant, we are brought to the plea of contributory negligence urged by the defendant against any right of plaintiffs to recover damages. The inquiry here is whether the danger was concealed, or the surrounding condition of things such as to warn the lineman who was injured. The proposition does not admit of discussion that, while it is the general duty of a

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master to exercise needful care and caution to prevent the exposure of his employee to great risks, the employee, on the other hand, must exercise ordinary diligence in guarding against injuries. The guy wire was 120 feet in length from the top of the pole to where it was attached to the trunk of the guy tree. Had he cut the guy wire at the china tree that served as a guy post, he would have been out of all danger. At the same time it is evident that the work would have been only half done. It would not have been workmanlike to leave that many feet of wire hanging from the pole. Moreover, there were leaks in the electric wires. The pole was marked as one of the "leaky" poles. The plaintiffs assert that in wet weather the wire might become charged, and be dangerous to any one coming in contact with it, and that it was prudent and proper to cut off the electric fluid. Be this as it may, it was most assuredly not unreasonable on the part of the lineman to lessen the work by cutting the guy wire at the pole, as he did, instead of cutting it at the guy tree. In the second place (having concluded to cut the wire from the pole), it is urged by the defendant that there was negligence in not having used the appliances in his possession and under his control, belonging to the company. These appliances, we are informed, were a "block and fall" and "come alongs." The evidence as to the use of these appliances is conflicting as to whether they are intended for removing wires. Several of the witnesses confine their use principally to pulling up the slack in the wire or letting off the slack gradually. Be all that as it may, not one of the witnesses has sought to prove that it was at all unusual or unreasonable to climb the pole and cut the wire as was done. Knowledge of the danger is not shown, nor is it evident that there was a want of ordinary care and prudence to avoid the usual dangers to which linemen are exposed. It is in the line of their duty to climb these poles, to attach or detach wires, and in performing such work as is needful in keeping up the system of which they in part have charge. They are provided with spurs for the purpose, and have other appliances to enable them to climb and dispatch the work. A lineman is not unreasonable or imprudent who takes it for granted that a pole was planted at the usual depth. The evidence that the accident could not have occurred if the pole had been planted at the usual depth

Assumption of
risk.

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is uncontradicted. The fact that after the accident it was planted some five feet and a half in depth, and that all guy wires are since dispensed with, is significant, and leads to the unavoidable conclusion that, if it had been properly put up in the first place, the accident would not have occurred. Generally, the office of the guy wire, we are informed, is to steady the post, and prevent its movement or vibration. If the post bends, or gives away in a curve, particularly, the trolley wires no longer remain plumb, and the trolley wheel leaves the wire. We think in this case the guy wires performed double duty,—that already stated, and, in addition, served to hold the pole in its position. It became evident after the fall that it was a support of the pole, but this support was not apparent before the accident, for the reason that nothing indicated that the planting was too shallow for it to be secure without the guy wires. The post stood at a point of the curve upon which there was great strain, it is true. The force, however, was not greater than an ordinary post could withstand.

The sufferer was not guilty of contributory negligence, as the act of climbing such poles is not unusual with linemen. The employee assumes the ordinary “risks of the employment which are apparent, and which he has the opportunity to detect.” Busw. Pers. Inj. § 204. Here the risks of the employment were not apparent, and the employee had no opportunity to detect the vice of construction. The superintendent, who was present, or the victim of the accident, did not in the least suspect the unsafe condition of the pole in question.

Employee not
bound to know
latent defects.

There are two items of damages claimed: (1) The alleged pain and suffering; (2) compensation for the loss of the support and assistance to plaintiffs, if he had not been fatally injured. As to the first, there is no moneyed standard of measurement. In a possible view of such cases, no amount would be excessive and sufficient compensation. In fixing the amount the ability to pay and precedents applying must be considered. As to the second, one of the plaintiffs is between 75 and 80 years of age, and the other about 60. The deceased was getting \$60 a month wages. There is uncertainty about the amount of contribution of a young man to the support of his parents. It may be considerable, or it may be very little, without violating the demand of duty.

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The damages are fixed at \$1,800. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount allowed from \$2,500 and interest to \$1,800 and interest thereon from March 17, 1896. As amended, the judgment is affirmed, at appellees' costs.

ILLINOIS CENTRAL R. CO.

*v.*STATE OF ILLINOIS *ex rel.* BUTLER.

(163 U. S. 142.)

Construction of State Statute—Jurisdiction of Supreme Court.—Where the construction given to a state statute by the state court does not involve a federal question, it must be accepted by the supreme court of the United States when the constitutionality of the statute is at issue.

Interstate Travel—Stoppage of Trains.—Where the effect of a state statute, as construed and applied by the supreme court of the state, is to require a fast-mail train, carrying interstate passengers and the United States mail over an interstate highway established by authority of congress, to delay the transportation of such passengers and mails by turning aside from the direct interstate route, and running to a station three miles and a half away from a point on that route, and back again to the same point, and thus traveling seven miles which form no part of its course before proceeding on its way, and to do this for the purpose of discharging and receiving passengers at that station, for interstate travel, to and from which the railroad company furnishes other and ample accommodation, is an unconstitutional hindrance and obstruction of interstate commerce and of the passage of the mails of the United States.

Interference with Carriage of Mails.—A statute of a state which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States cannot be considered as a reasonable police regulation.

IN error to the supreme court of the state of Illinois.
Reversed.

This was a petition for a writ of mandamus, based upon Rev. St. Ill. 1889, c. 114, § 88, which is as follows:

“Every railroad corporation shall cause its passenger trains to stop upon its arrival at each station, advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to

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receive and let off such passengers with safety: provided, all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and let off passengers with safety."

The petition was filed April 17, 1891, in the circuit court for Alexander county, in the state of Illinois, by the county attorney, in behalf of the state, alleging that the Illinois Central Railroad Company ran its south-bound fast-mail train through the city of Cairo, two miles north of its station in that city, and over a bridge across the Ohio river connecting its road with other roads south of that river, without stopping at its station in Cairo, and praying for a writ of mandamus to compel it to cause all its passenger trains, coming into Cairo, to be brought down to that station, and there stopped a sufficient length of time to receive and let off passengers with safety. Case stated.

The defendant contended that the statute did not require its fast-mail train to be run to and stopped at its station in Cairo, and that the statute was contrary to the constitution of the United States, as interfering with interstate commerce and with the carrying of the United States mails.

By the act of congress of September 20, 1850 (chapter 61), entitled "An act granting the right of way and making a grant of land to the states of Illinois, Mississippi, and Alabama, in aid of the construction of a railroad from Chicago to Mobile," the right of way through the public lands, with the right to take earth, stones, and timber necessary for the construction of the road, was "granted to the state of Illinois for the construction of a railroad from the southern terminus of the Illinois & Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago on Lake Michigan, and another via the town of Galena in said state to Dubuque in the state of Iowa," and a copy of the survey of the road and branches, made under direction of the legislature, was required to be forwarded to the proper land office, and to the general land office in the city of Washington. By sections 2-4, alternate sections of land on each side of the road were granted to the state of Illinois, "subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and the said railroad and branches shall be and remain a public highway, for the use of the government of the United States, free from toll or

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other charge upon the transportation of any property or troops of the United States." By section 6, "the United States mail shall at all times be transported on the said railroad, under the direction of the post-office department, at such price as the congress may by law direct." And by section 7, "in order to aid in the continuation of said Central Railroad from the mouth of the Ohio river to the city of Mobile," similar grants of "rights, privileges, and liabilities," and of lands, were made "to the states of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from said city of Mobile to a point near the mouth of the Ohio river." 9 Stat. 466.

The legislature of Illinois, by the statute of February 10, 1851, incorporated the Illinois Central Railroad Company, and empowered it "to survey, locate, construct, complete, alter, maintain, and operate a railroad, with one or more tracks, from the southern terminus of the Illinois & Michigan Canal to a point at the city of Cairo, with a branch of the same to the city of Chicago on Lake Michigan, and also a branch via the city of Galena to a point on the Mississippi river opposite the town of Dubuque in the state of Iowa"; and, by section 15, for that purpose only, ceded and granted to that corporation the right of way and lands granted to the state by the act of congress of September 20, 1850; and required "the main trunk thereof, or central line, to run from the city of Cairo to the southern termination of the Illinois & Michigan Canal," "and nowhere departing more than seventeen miles from a straight line between" those two points; and required the corporation to mortgage said right of way and lands to the state of Illinois to secure the application of the proceeds of those lands "to the constructing, completing, equipping, and furnishing said road and branches, in accordance with the terms of this act, and said act of congress"; and, by section 19, declared "said road and branches to be free for the use of the United States, and to be employed by the post-office department, as provided in said act of congress." Priv. Laws Ill. 1851, pp. 61, 66, 68, 71. And by section 3 of the statute of Illinois of February 17, 1851, that act of congress was expressly "accepted, and the conditions expressed in said act are hereby agreed to, and made obligatory upon the state of Illinois." Gen. Laws Ill. 1851, p. 192.

By the statute of Illinois of February 2, 1855, "all railroad

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companies incorporated or organized under, or which may be incorporated or organized under, the authority of the laws of this state, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof; and also to contract for and hold, in fee simple or otherwise, lands or buildings in this or other states for depot purposes; and also to purchase and hold such personal property, as shall be necessary and convenient for carrying into effect the object of this act"; and "shall have the right of connecting with each other, and with the railroads of other states, on such terms as shall be mutually agreed upon by the companies interested in such connection." And by the statute of Illinois of February 25, 1867, "railroads terminating or to terminate at any point on any line of continuous railroad thoroughfare, where there now is or shall be a railroad bridge for crossing of passengers and freight in cars over the same as part of such thoroughfare, shall make convenient connections of such railroads, by rail, with the rail of such bridge; and such bridge shall permit and cause such connections of the rail of the same with the rail of such railroads, so that by reason of such railroads and bridge there shall be uninterrupted communication over such railroads and bridge as public thoroughfares; but by such connections no corporate rights shall be impaired." 2 Starr & C. Ann. St. Ill. pp. 1921, 1922.

By the act of congress of June 15, 1866 (chapter 124), entitled "An act to facilitate commercial, postal, and military communication among the several states," and having this preamble: "Whereas the constitution of the United States confers upon congress, in express terms, the power to regulate commerce among the several states, to establish post-roads, and to raise and support armies: Therefore," it is enacted "that every railroad company in the United States, whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of its destination: provided, that this act shall not affect any stipu-

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lation between the government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road; nor shall it be construed to authorize any railroad company to build any new road, or connection with any other road, without authority from the state in which said railroad or connection may be proposed"; and "that congress may at any time alter, amend or repeal this act." 14 Stat. 66.

By the act of congress of December 17, 1872 (chapter 4), amended by the supplementary act of February 14, 1883 (chapter 44), "any person or corporation, having lawful authority therefor, may hereafter erect bridges across the Ohio river, for railroad or other uses, upon compliance with the provisions and requirements of this act," among which are that they shall be built of a certain height above low-water mark, and at places and according to plans approved by the secretary of war; and any bridge constructed under and according to this act is declared to be a lawful structure, to be recognized and known as a post route, and for the transmission over which of the mails, the troops, and the munitions of war of the United States, no higher charge is to be made than the rate per mile over the railroads or public highways leading to it, and across which the United States are to have the right of way for postal telegraph purposes. 17 Stat. 398; 22 Stat. 414.

The city of Cairo is situated upon the point of land at the junction of the Mississippi and Ohio rivers, and is surrounded by high levees to protect it from the river floods, and since 1859 has been a county seat. In 1855, the defendant completed the location and building of its road, and laid and since maintained its track to the bank of the Ohio river, then taking a sharp turn westward, and passing, in the city of Cairo, for the distance of two miles along the Ohio Levee embankment, to a place less than half a mile from the junction of the waters of the two rivers, and at the intersection of Second and Ohio Levee streets, where its only passenger station in Cairo was established, and until a few months before the filing of the petition ran all its passenger trains to and from that station, and made it the southern terminus of its railroad.

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By the statute of Kentucky of March 29, 1886 (chapter 446), the Chicago, St. Louis & New Orleans Railroad Company and the Illinois Central Railroad Company were authorized "jointly, or either of them separately, to build, erect, construct, and forever maintain, use and operate a railroad bridge over and across the Ohio river from the Kentucky shore, in Ballard county, opposite the city of Cairo, to any point in the city of Cairo, Illinois," conformably to the conditions and limitations of the acts of congress of 1872 and 1883, above cited.

Pursuant to that statute, the Chicago, St. Louis & New Orleans Railroad Company, into which various railroad corporations had been consolidated by statutes of the states of Louisiana, Mississippi, Tennessee, and Kentucky, and whose line extended from New Orleans to the Ohio river, built a bridge across the Ohio river to low-water mark on the Illinois side, to which the jurisdiction of the state of Kentucky extended. *Indiana v. Kentucky*, 136 U. S. 479. The north end of this bridge was at that part of Cairo about two miles north of the defendant's station in that city, and the peculiar conformation of the land and water made it impracticable to put it nearer to the junction of the two rivers. The height at which the bridge had to be built, in order to avoid obstructing navigation, required the approaches on both banks to be graded. The approach on the Illinois side was built by the defendant, upon its own land, at the grade of 35 feet to a mile, and beginning a mile and a half off, at Bridge Junction, beyond the corporate limits of Cairo.

After this bridge was built, and the defendants' road was thereby connected with the Chicago, St. Louis & New Orleans Railroad, the defendant put on a daily fast-mail train, to run from Chicago to New Orleans, carrying passengers, as well as the United States mail, not going to or stopping at its station in Cairo, but connecting, at a point some nine miles out on the main line, with a short train from that station.

Trains passing over the through route from Chicago to New Orleans, and stopping at Cairo, are obliged to leave the main line at Bridge Junction, and to run down three and a half miles to the Cairo station, and back to the same point on the main line. Six regular passenger trains were so run daily, giving adequate accommodations for passengers to or from Cairo.

The defendant offered to prove that the schedule of running

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time of the fast-mail train had been fixed by the post-office department of the United States, and could not be changed by the defendant. The court excluded the evidence, "for the reason that it is not competent for the defendant to enter into the contract with the government of the United States, whereby it renders itself incapable of complying with the laws of Illinois," and allowed an exception to this ruling.

The court granted a writ of mandamus, commanding the defendant to cause its south-bound fast-mail train, and all its other passenger trains coming into Cairo, to be run or brought down to its passenger station at the intersection of Ohio Levee and Second streets, and there to be stopped a sufficient length of time to receive and let off passengers with safety.

The defendant appealed to the supreme court of the state, which affirmed the judgment, and held that the statute of Illinois concerning the stopping of trains obliged the defendant to cause its fast-mail train to be taken into its station at Cairo and to be stopped there long enough to receive and let off passengers with safety, and that the statute, so construed, was not an unconstitutional interference with interstate commerce, or with the carrying of the United States mails. *Illinois Cent. R. Co. v. People*, 143 Ill. 434. The defendant sued out this writ of error.

James Fentress and Wm. H. Green, for plaintiff in error.

John M. Lansden, for defendant in error.

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

The line of railroad communication, crossing the Ohio river at Cairo, and of which the Illinois Central Railroad forms part, has been established by congress as a national highway for the accommodation of interstate commerce and of the mails of the United States, and as such has been recognized and promoted by the state of Illinois. This will clearly appear by a brief recapitulation of the acts of congress and the statutes of Illinois upon the subject.

Congress, in the act of September 20, 1850 (c. 61), granted a right of way, and sections of the public lands, to the state of Illinois, to aid in the construction of a railroad in that state from the southern termination of the Illinois & Michigan Canal "to a point at or near the junction of the Ohio and Mississippi rivers," with branches to Chicago and Dubuque,

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"to be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States," and on which the United States mail should "at all times be transported, under the direction of the post-office department, at such price as the congress may by law direct"; and, in order "to aid in the construction of said Central Railroad," made like grants to the states of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from the city of Mobile "to a point near the mouth of the Ohio river." 9 Stat. 466.

The manifest purpose of congress was to establish a railroad in the centre of the continent, connecting the waters of the Great Lakes with those of the Gulf of Mexico, for the benefit of interstate commerce, as well as of the military and postal departments of the government of the United States.

The state of Illinois, by a statute of February 10, 1851, chartered the Illinois Central Railroad Company, and ceded to it the rights and lands granted to the state by the act of congress, for the purpose of constructing and maintaining within the state such a trunk line and branches, describing its southern terminus as "a point at the city of Cairo," and declaring "said road and branches to be free for the use of the United States, and to be employed by the post-office department, as provided in said act of congress"; and (as if that were not sufficient) by another statute, a week later, the state expressly accepted the act of congress, and agreed to be bound by the conditions expressed therein.

By the statute of Illinois of February 2, 1855, all railroad corporations of the state were empowered to make contracts with each other, and with railroad corporations of other states, for leasing, or running, or connecting their railroads; and by the statute of Illinois of February 25, 1867, railroads terminating at a point at which there was a railroad bridge on a line of continuous railroad thoroughfare were required to be connected by rail, as to make "an uninterrupted communication over such railroads and bridge as public thoroughfares."

By the act of June 15, 1866, c. 124, congress, for the declared purpose of facilitating commerce among the several states, and the postal and military communications of the United States, authorized every railroad company in the United States, whose road was operated by steam, to carry

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over its road, bridges, and ferries, as well passengers and freight, as government mails, troops, and supplies, from one state to another; and to connect, in any state authorizing it to do so, with roads of other states, so as to form continuous lines of transportation. 14 Stat. 66.

By the acts of congress of December 17, 1872 (chapter 4), and February 14, 1883 (chapter 44), bridges were authorized to be built across the Ohio river by any person or corporation, having lawful authority therefor, and with the approval of the secretary of war, and were declared to be lawful structures and post routes for the transmission of the mails and the troops and munitions of war of the United States. 17 Stat. 398; 22 Stat. 414.

It is not denied that the bridge across the Ohio river from the Kentucky shore to the Illinois shore, opposite the city of Cairo, was constructed by lawful authority, and as permitted by congress. Nor is it denied that the Illinois Central Railroad Company had the right, under the acts of congress and the statutes of Illinois, to connect its road with that bridge, and to run its southward-bound trains over that bridge as part of a system of interstate communication.

But it is contended, on behalf of the state of Illinois, that the station of the Illinois Central Railroad Company at the southern terminus of its road in the city of Cairo, having been originally established, and still remaining, at a point some three and a half miles from so much of its main line as forms part of the through communication by railroad from the state of Illinois, across the Ohio river, to the state of Kentucky and other Southern states, the corporation is obliged, by a statute of the state of Illinois, to cause all its trains, including the fast-mail train from Chicago to New Orleans, to be brought down to that station, and to stop there long enough to receive and let off passengers with safety.

The statute in question is as follows: "Every railroad corporation shall cause its passenger trains to stop upon its arrival at each station, advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: provided, all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats, to receive and let off passengers with safety." Rev. St. Ill. 1889, c. 114, § 88.

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It was argued, in behalf of the railroad company, that the whole effect of this section was to require each train "to stop upon its arrival" at a station long enough to receive and let off passengers with safety; that the first part of the section only required trains to stop upon arrival "at each station advertised as a place for receiving and discharging passengers upon and from such trains"; that the proviso merely required trains to stop, for a like time, on arriving at "the railroad station of county seats," although not so advertised; and that no part of the section required any train to arrive at, or to go to, any particular station.

The supreme court of the state, however, held that the statute not only required every train to stop at every county seat at which it arrived, but that, as Cairo was admitted to be a county seat, the statute required every train passing through the city of Cairo to go to and stop at the station in that city. The construction given to the statute in this particular by the state court does not involve any federal question, and must be accepted by this court in judging of the constitutionality of the statute. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 456.

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But the decision that the statute, so construed, was not an unconstitutional interference with interstate commerce, or with the carrying of the mails by the United States, was a decision in favor of the validity of a state statute whose validity was drawn in question on the ground of its being repugnant to the constitution and laws of the United States, as well as a decision against a right specially set up and claimed under the national constitution and laws, and is therefore clearly reviewable by this court.

The effect of the statute of Illinois, as construed and applied by the supreme court of the state, is to require a fast-mail train, carrying interstate passengers and the United States mail, from Chicago, in the state of Illinois, to places south of the Ohio river, over an interstate highway established by authority of congress, to delay the transportation of such passengers and mails, by turning aside from the direct interstate route, and running to a station three miles and a half away from a point on that route, and back again to the same point, and thus traveling seven miles which form no part of its course, before proceed-

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ing on its way, and to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which, as is admitted in this case, the railroad company furnishes other and ample accommodation.

This court is unanimously of opinion that this requirement is an unconstitutional hindrance and obstruction of interstate commerce and of the passage of the mails of the United States.

Upon the state of facts presented by this record, the duties of the Illinois Central Railroad Company were not confined to those which it owed to the state of Illinois under the charter of the company and other laws of the state, but included distinct duties imposed upon the corporation by the constitution and laws of the United States.

The state may doubtless compel the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini within the state. But so long, at least, as that duty is adequately performed by the company, the state cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the constitution and laws of the United States.

The state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic. *Railroad Co. v. Richmond*, 19 Wall. 584, 589; *Stone v. Trust Co.*, 116 U. S. 307, 334, 23 Am. & Eng. R. Cas. 577; *Smith v. Alabama*, 124 U. S. 465, 33 Am. & Eng. R. Cas. 423.

It may well be, as held by the courts of Illinois, that the arrangements made by the company with the post-office department of the United States cannot have the effect of abrogating a reasonable police regulation of the state. But a statute of the state which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States cannot be considered as a reasonable police regulation.

In *Railroad v. Hall*, 91 U. S. 343, cited by the counsel for the state, the writ of mandamus was issued to promote, not to defeat, interstate transportation.

The question whether a statute which merely required interstate railroad trains, without going out of their course, to

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stop at county seats, would be within the constitutional power of the state, is not presented, and cannot be decided, upon this record.

The result is that the judgment of the supreme court of the state, which requires the Illinois Central Railroad Company to cause its fast-mail train to be brought into and stopped at its station in Cairo, is erroneous, and must be

Reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

FREMONT, E. & M. V. R. CO.

v.

FRENCH.

(*Supreme Court of Nebraska, May 20, 1896.*)

Negligence Presumed.—It is only necessary to a right of recovery against a railroad company to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of such railroad. A presumption thereupon arises that such management or operation was negligent, and can be met only by showing that the injury arose from the criminal negligence of the party injured, or that the injury complained of was the result of the violation of some express rule or regulation of such company actually brought to the notice of the party injured.

Common Carrier, an Insurer of Passenger's Safety.—By the statutes of this state a common carrier is made an insurer of the safety of its passengers, except as against the criminal negligence of such passenger, or his violation of some rule of the carrier actually brought to such passenger's notice. Section 3, art. 1, c. 72, Comp. St. 1895.

Credibility of Witnesses for the Jury.—The credibility of witnesses is for the jury; and this court cannot say that the finding of a jury is not supported by sufficient evidence because a greater number of witnesses testified against the finding than testified in its favor.

Criminal Negligence on Part of Passenger must be Shown.—In a suit by a passenger against a common carrier for damages for an injury alleged to have been sustained while such passenger, when the passenger has shown that the defendant is a common carrier, that he was the carrier's passenger, and, while such, was injured, and the extent of such injury, he has made out his case. The carrier then, to escape liability, must show that the injury of the passenger was the result of his criminal negligence, or the result of a violation by him of some express rule or regulation of the carrier actually brought to the passenger's notice.

Damages Awarded as Compensation.—The law awards damages to a

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party injured through the negligence of another, not as a punishment of the negligent party, but as compensation for the pecuniary loss sustained and the pain and suffering endured by the injured party.

Relation between Carrier and Passenger is Contractual.—The relation existing between a common carrier and a passenger is a contractual one, the undertaking of the carrier being to safely transport and deliver the passenger at his destination; and the violation of this contract by the carrier entitles the passenger to recover such damages as will fully compensate him for the injury and loss sustained; but the passenger is not entitled to damages that will put him in a better position than he would have been in had the carrier complied with its contract.

Excessive Damages.—The damages awarded a passenger in this case *held* to be excessive, and a remittitur of \$1,300 ordered.

ERROR to Brown county district court. *Affirmed on condition.*

John B. Hawley, Wm. B. Sterling, and B. T. White, for plaintiff in error.

E. F. Gray and D. B. Carey, for defendant in error.

RAGAN, C.—George W. French sued the Fremont, Elkhorn & Missouri Valley Railroad Company, in the district court of Brown county, for damages for an injury which he alleged he had received while a passenger of the railroad company. French had a verdict and judgment, and the railroad company prosecutes here proceedings in error.

1. That the railroad company was a common carrier of passengers for hire, that French was a passenger on one of its trains, and, while such passenger, was injured, there was no dispute on the trial of this case in the court below, nor is there any here. Section 3, art. 1, c. 72, Comp. St. 1895, provides that "every railroad company * * * shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." This statute was construed in *Railroad Co. v. Baier*, 37 Neb. 235, and it was there held that

Negligence presumed. "it is only necessary to a right of recovery against a railroad company to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said rail-

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road. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or that the injury complained of was the result of the violation of some express rule or regulation of said company, actually brought to the notice of the party injured." This construction of the statute was adhered to in *Railroad Co. v. Porter*, 38 Neb. 226, and again in *Railroad Co. v. Landauer*, 39 Neb. 803; *Railroad Co. v. Hedge*, 44 Neb. 448. The court, in construing the statute, said: "By the statute of this state, a common carrier is made an insurer of the safety of its passengers, except as against the gross negligence of such passenger, or his violation of some rule of the carrier brought to such passenger's notice." Common carriers are insurers of safety of passengers.

French's injury happened on the 4th day of February, 1891. On that day he was a passenger on the cars of the defendant railroad company from the city of Omaha to the city of Ainsworth, and was injured at the station of his destination. There was no claim in the court below, nor is there any here, that French's injury was the result of his violation of any rule or regulation of the railroad company. The defense of the railroad company interposed in the court below was that, as the train on which French was a passenger was moving rapidly in front of the station platform at Ainsworth, French attempted to step or jump from the steps of the coach on which he was riding, to the station platform, and fell, and was thus injured. It will thus be seen that the railroad company assumed that the act of French in stepping or jumping from the moving train to the platform—if he did so step or jump—was criminal negligence on his part, within the meaning of the statute quoted. We do not decide whether this assumption of the railroad company was correct or not. If French jumped or stepped from the moving train to the platform, the act may have been such as to permit of no other inference than that of negligence on his part; as in *Railroad Co. v. Landauer*, 36 Neb. 642; *Id.*, 39 Neb. 803; *Woolsey v. Railroad Co.*, 39 Neb. 798; or the act of French may have been simply evidence which tended to prove negligence on his part, as in *Railroad Co. v. Porter*, 38 Neb. 226; *Railroad Co. v. Hyatt* (Neb.), 67 N. W. Rep. 8; *Railroad Co. v. Hedge*, 44 Neb. 448. But whether the act of French

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was evidence which merely tended to prove negligence, or demanded an inference of negligence, on his part, depended upon the peculiar facts and circumstances under which he stepped or leaped from the train. We are not concerned here with the question whether his act was negligence or evidence which tended to prove negligence. The proposition presented to us is the correctness of the finding of the jury that French did not step or jump from the train while in motion. French's theory of the injury was that he did not leave his seat in the car until the train stopped at Ainsworth; that he then went out to the platform of the car, and stepped down on the lower step, and lifted one foot into the air, for the purpose of stepping to the station platform, the car in the meantime standing still; and, while he was thus in the act of stepping to the platform, the train was suddenly jerked forward, throwing him to the ground, and partly under the train; and that the train then moved up a short distance, and stopped the second time. Some 4 or 5 witnesses testified to French's version of the accident; and some 15 or 16 witnesses contradicted his version of the accident, more or less directly and positively. Some of the circumstances in the case strongly corroborate French's theory.

The first assignment of error argued here is that the finding of the jury in favor of French's theory of the accident is not supported by sufficient evidence. We think it is. We did not hear these witnesses testify. We have had no means of observing them or their demeanor. The credibility of these

Credibility of witnesses. witnesses was for the jury; and because 5 witnesses testified directly that a thing did happen, and 16 witnesses testified more or less directly that that

thing did not happen, this court cannot say that the jury was wrong in believing the 5 witnesses instead of the 16. *Railroad Co. v. Craig*, 39 Neb. 601. But, in addition to this, the learned district judge heard these witnesses testify, and he has put the seal of his approval upon their verdict on this question by overruling the motion for a new trial. This court cannot reverse the finding of the jury because a greater number of witnesses testified against the finding of the jury than testified in favor of this finding. French having shown that the railroad company was a common carrier of passengers for hire, that he was a passenger on one of its trains, and, while such passenger, was injured, he had then made out his

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case; and the railroad company, to escape liability, was under the necessity of showing that the injury for which French sued was the result of his criminal negligence, or the result of a violation by him of some express rule or regulation of the railway company, actually brought to his notice. It was the opinion of the jury that the carrier had not done this, and we cannot say that the conclusion of the jury on that subject was wrong.

2. The next assignment of error which we notice is that the damages awarded French are excessive, and appear to have been given under the influence of passion and prejudice. The judgment in this case is for \$6,300. We find nothing in the record which we think justifies us in concluding that the award of damages in this case was the result of passion or prejudice on the part of the jury. But are the damages excessive under the facts in evidence in the case? French when injured was a man 24 years of age, in good health. He was a farmer by occupation. The injury consisted of a cut made by the flange of a car wheel in the fleshy part of his heel, and the laceration and bruising of the muscles of his ankle, and its being severely strained and twisted. No joints were dislocated, and no bones broken. He was in bed some 11 weeks, during which time he suffered more or less pain. From the time he got out of bed, until the autumn of the same year, he was compelled to use crutches in moving about; and it would seem from the evidence that he lost, as the result of the accident, about a year's time. The case at bar was tried in November, 1892. And at that time he appears to have been on the high road to getting well, although at that time his ankle was slightly stiff and tender and somewhat sore. He was not permanently injured by the accident, as that term is generally understood; that is, he was not permanently and entirely disabled. He testified that he could not do as much work by about half since his injury as before. His physician testified that his ankle would be more or less weak always, but in time could be used without pain or other inconvenience, except the inconvenience of its stiffness; that the injured parts of his foot had been and were constantly improving; and that he might almost entirely recover; and that he presented one of the best of subjects for a cure, by reason of his youth and strength.

The record contains no evidence showing what French was

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capable of earning either before or after the injury; nor does the evidence disclose that he suffered any great or excruciating pains for any very considerable time. He incurred an expense of \$200 for medical attendance. The law awards damages to a party injured through the negligence of another, not as a punishment of the negligent party, but as compensation for the pecuniary loss sustained and the pain and suffering endured by the injured party. *Railroad Co. v. Leslie*, 41 Neb. 159.

Damages
awarded as
compensation.

The relation existing between French and the railroad company was a contractual one; the contract of the railroad company being to safely carry French from Omaha to Ainsworth, and safely deliver him at the latter place. The railroad company violated this contract, and French is entitled to such sum as damages as will fully compensate him for the injury and loss sustained and pain suffered; but he is not entitled to such damages as will put him in a better position than he would have been in had the railroad company not violated its contract. The amount of damages awarded French by the judgment under consideration, if invested at the rate of interest lawful in this state, would yield an annual revenue of

Relation be-
tween carrier
and passenger
contractual.

Excessive
damages.

\$630. We think this amount excessive, in view of the evidence. We think that \$5,000 will reimburse French for the necessary and reasonable liabilities incurred by him for nursing and doctor's bills, and reimburse him for all time lost or that he will lose by reason of this injury, and amply recompense him for all pain and suffering which he has endured or may endure by reason of the injury. The judgment of the district court is therefore reversed, unless the defendant in error shall, within 30 days from this date, file with the clerk of this court a remittitur of \$1,300. If such remittitur is filed, the judgment for \$5,000 will be affirmed.

IRVINE, C. (dissenting).—I cannot concur in the conclusion of the court permitting an affirmance of this judgment on plaintiff's remitting \$1,300. Where damages are wholly unliquidated, and necessarily determined on general considerations, without definite rules of admeasurement, the jury is the body which should fix them, and verdicts should not be disturbed unless so clearly disproportionate to the injury sustained as to strike the mind as being manifestly excessive.

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My associates think this judgment to be of this character, and in this I agree with them; but I cannot see by what process they ascertain that \$5,000 is reasonable, while \$6,300 is so grossly excessive as to call for judicial interference. The difference between the two sums is too small to afford grounds for distinction, where, as in this case, every basis of mathematical calculation is absent, and the elements for consideration are of so speculative a nature as mental and physical suffering and bodily inconvenience. I think, measured by verdicts which have been sustained in similar cases, a much larger remittitur should be required; but, on a matter so much involved in speculation, I would yield my individual opinion to the combined views of the jury, which found a verdict for \$10,000, of the trial judge, who reduced it to \$6,300, and of my associates, who think \$5,000 a proper sum. But, conceding that their views are more nearly right, the difference between the judgment rendered and the estimate of my associates is, in my opinion, too slight to justify any interference with the judgment. Either the judgment is clearly excessive, and a substantial remittitur should be required, or it should be affirmed as it stands.

NORVAL, J., concurs in the foregoing dissenting opinion.

CONSOLIDATED TRACTION CO.

v.

SCOTT.

(Court of Errors and Appeals of New Jersey, June 15, 1896.)

Care to be Observed by Street-Railway Company.—A street-railway company propelling its cars by electricity along the public streets of a city owes a duty to the public which requires it to so regulate the movements of its cars at the intersection of such streets, when receiving or discharging passengers from a standing car, as not to unnecessarily expose pedestrians to the danger of collision with a passing car on the opposite track.

Case at Bar.—While a care of such a company was stopping at a street crossing, to receive and discharge passengers, a boy of the age of seven years and eight months, who was walking across the street from behind the standing car, was struck and killed by another of its cars, passing

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from the opposite direction. The evidence tended to prove that the boy's view of the approaching car was obstructed until he had passed the standing car; that no bell or gong was sounded by the approaching car, which was going at the rate of six miles an hour; and that the boy did not look for an approaching car before entering upon the track, where he was struck almost immediately upon stepping upon it, and carried a distance of 30 or 40 feet before the car could be stopped. Upon the trial of an action for damages against the company for negligently causing the death, the trial judge refused motions to nonsuit, and to direct a verdict, on the alleged grounds that there was no proof of negligence on the part of the company, and that contributory negligence was established on the part of the plaintiff's intestate, and ruled that the questions of negligence and contributory negligence were for the jury. *Held*, that the judge committed no error in so ruling.

Instructions.—It was also held to be no error in the judge to refuse to charge that it was not the duty of the moving car to stop before passing the standing car, the judge having already charged the jury that it was for them to say, under all the circumstances, whether it was negligence upon the part of the motorman to run past that standing car at that time and place, or not.

Street-Railway Crossing—Negligence.—The rule requiring one to look and listen before crossing a steam railway, in order to be in the exercise of due care, does not apply with equal force to one crossing the track of a street railway in a city street where the company and the public stand on an equal footing in the use of the highway; and it was held that it was not negligence *per se* in the plaintiff's intestate, under the circumstances, in going upon the defendant's track without first looking for an approaching car; and the judges refusal to so charge was sustained, he having fairly submitted the question of contributory negligence as a matter for the jury to determine, upon the facts in evidence.

Degree of Care—Question for Jury.—When a child has reached the age of discretion, and is considered *sui juris* as a matter of law, the degree of care and caution required of him will be no higher than such as is usually exercised by persons of similar age, judgment, and experience; and whether that degree of care and caution has been exercised by the child in a given case is generally, if not always, a question for the jury.

ERROR to supreme court. *Affirmed.*

Warren Dixon, for plaintiff in error.

Allan L. McDermott, for defendant in error.

HENDRICKSON, J.—Virginia A. Scott, the defendant in error, brought suit in the supreme court against the Consolidated Traction Company, the plaintiff in error, in tort, for damages resulting from the death of her son, William Scott, a boy aged seven years and eight months, caused by being run over by a trolley car of the defendant below, in the city of Bayonne, on the 9th day of October, 1894. The suit was brought by the mother, as administratrix of the son, for the benefit of the next of kin, under the statute. The trial took

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place before Justice LIPPINCOTT and a jury in the Hudson circuit, and resulted in a verdict for the plaintiff below. The matters for review brought into this court are alleged errors of the trial judge upon exceptions taken below upon his refusing, at the close of the plaintiff's case, to call the plaintiff, and order a nonsuit, and also upon his refusal, at the close of the evidence on both sides, to direct a verdict for the defendant below, and also upon exceptions taken to the judge's refusal to charge as requested, and to portions of the charge as delivered.

The facts of the case as developed by the evidence of the plaintiff below, briefly stated, were that plaintiff's son William, in company with his brother Horace, aged nine years, were returning home from a store to which they had been sent, and, in so doing, were passing along the north side of Centre street, in said city, in a westerly direction, and were about to cross Avenue C, along which the defendant was engaged in running an electric street railway with double tracks, running from Jersey City to Bergen Point. The general course of the railway was from north to south. As the boys neared the northerly crossing of Center street over Avenue C, a closed car, on its way to Jersey City, approached on the north-bound track, and stopped two or three feet north of the crossing, for the purpose of receiving and discharging passengers. While the car was so standing there, receiving passengers, the boys, with one other pedestrian, Mr. McFale, had reached the crossing in the rear of the standing car. Mr. McFale and the larger boy stopped; but the smaller boy, who was one or two feet back of them, walked onto the south-bound track, where he was struck by a car from Jersey City, and killed. Just before the car struck him, he was seen to make a sort of spring, as if to get out of the way, but it was too late. The standing car obstructed the vision of those behind it, from seeing an approaching car on the south-bound track. The south-bound car was traveling at the rate of 6 miles per hour, and had passed the rear of the standing car 7 or 8 feet before it struck the boy. The motorman at once reversed the car, which continued its motion to the south side of Center street some 30 or 40 feet before it was brought to a standstill. The witnesses heard no sound of bell or gong from the approaching car, and there was no evidence that the boy knew a car was approaching

Case stated.

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when he started to pass over from behind the standing car. The boy was familiar with the passing of cars to and fro on Avenue C, and had often passed over this crossing.

While these may not be all of the facts shown, I think they are sufficient upon which to fairly consider the legality of the judge's rulings at the trial. Upon the facts proved, the defendant moved that the plaintiff be nonsuited, on the ground that no negligence had been shown on the part of the defendant, and that contributory negligence had been proved on the part of the plaintiff's intestate. This motion the judge refused, and his refusal is now assigned for error. It is insisted in support of this assignment of error that the plaintiff below failed to establish any facts from which the jury would be justified in finding negligence on the part of the defendant. But this insistment is scarcely in accord with the well-settled rule regulating the action of the trial judge upon such a motion. It is not for him to say whether there are any facts proven in a given case from which the jury would be justified in finding negligence on the part of the defendant, but, rather, whether any facts have been established by evidence from which negligence might be reasonably inferred by a jury. As stated by Justice MAGIE in delivering the opinion of this court in *Railway Co. v. Block*, 55 N. J. L. 605, 56 Am. & Eng. R. Cas. 590: "In performing this function, the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury." In applying this general rule to the examination of the facts, it must be remembered that "negligence is not a fact which is the subject of direct proof, but an inference from facts put in evidence." "Now negligence," says Dr. Wharton, "may be disputed when the facts are undisputed; and the question in such case, where the dispute is real and serious, is eminently one for the jury, under the direction of the court." Whart. Neg., 3420. "Whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case should properly be left to the jury, and that, in order to withdraw such a case from the jury, the facts should not only be undisputed, but the inferences, in respect of the defendant's failure of duty,

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which arises from these facts, should be indisputable." 2 Thomp. Trials, 1208. This same doctrine has been repeatedly laid down by this court. *Bonnell v. Railroad Co.*, 39 N. J. L. 189; *Bahr v. Lombard*, 53 N. J. L. 233; *Baldwin v. Shannon*, 43 N. J. L. 596; *Railroad Co. v. Shelton*, 55 N. J. L. 342; *Railroad Co. v. Matthews*, 36 N. J. L. 531.

Can it be said, as a matter of law, that, upon the facts stated, there was no duty laid upon the defendant at this public crossing to so regulate the action of its cars, as to rate of speed, the giving of signals, or otherwise, that pedestrians should be protected from unnecessary exposure to danger from collision with its passing cars? The counsel for the plaintiff in error, in his argument, admitted that the company might owe such a duty to a passenger who alighted from the north-bound car, and had passed behind it in making his exit, by reason of its contractual relations with the passenger. Indeed, it has been held that, in an action for injuries to plaintiff's intestate while crossing defendant's car track, negligence and contributory negligence are questions for the jury, where it appears that the intestate, on alighting from one of the defendant's cars, passed behind it, and attempted to cross the other track, when he was struck by an approaching car, which was running at its ordinary speed, and there is no evidence that any signal or warning of its approach was given. *Dobert v. Railway Co.* (Sup.), 36 N. Y. Supp. 105. In another case, an instruction that the care required of a street-car company to persons upon its tracks is not that high degree of care which it is required to exercise towards passengers was held to be incorrect when applied to a company running electric cars on city streets. *Railway Co. v. Dunlap*, (Tex. Civ. App.) 26 S. W. 877. It is well settled that, at crossings, streets cars and pedestraings have equal rights to the use of the streets; and it has been held in that connection that what is proper care and precaution on the part of those in charge of cars to prevent accidents is a question of fact in each case. *Schulman v. Railroad Co.* (Super. N. Y.), 36 N. Y. Supp. 439. That such a duty towards pedestrians who are thus passing along the crossing of a public street traversed by a street-car company becomes chargeable to the latter is emphasized by the fact that such crossings are necessarily and legally frequented, by not only the adults, but by the children of a town

Case to be observed by street railway company.

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attended or unattended by older people, and that such duty becomes more or less exacting, according to the circumstances of each case. The facts in the present case, to say the least, fairly raised a question for the jury whether the defendant was in the exercise of due and reasonable caution when it permitted its south-bound car to pass the standing car at that public crossing, and at such a rate of speed, under the circumstances. In forming a judgment upon that question, there were subsidiary questions, equally calling for consideration and judgment, such as: Was it the duty of the motorman, in the exercise of due and proper care, as he approached the standing car, which would obstruct his view of passengers or pedestrians who might be waiting to pass, to sound his bell or gong as a warning? And did he so sound his bell or gong? And should he have had his car under control at this crossing? And did he have it under such control when approaching the standing car? These facts and the inferences to be fairly drawn from them, under the principle before alluded to, it seems to me, clearly, were matters for the jury exclusively, and that the trial judge was right in so submitting them, and refusing to nonsuit.

The next ground of contention why the motion to nonsuit should prevail was because of alleged contributory negligence on the part of the plaintiff's intestate. But like
Case at bar. the preceding ground, in order to give it the effect of requiring the court to arrest the trial, and take the matter from the jury, the fault of the intestate must appear to be so clearly established by the evidence that there can be reasonably only one opinion on the subject. The chief justice, in *Railroad Co. v. Matthews*, *supra*, after saying in substance, upon a motion of this character, that the evidence on the subject was open to fair debate, and left the mind in a state of some doubt on the question of exercising that degree of care, which the plaintiff's legal duty exacted, added: "This being the case, the judge would not have been justified in taking this question from the jury. Such a course is proper only when the absence of caution is apparent, and is, in reason, indisputable." The evidence in this cause, at the close of the plaintiff's case, showed that the boy was making his way across the street, to go to his home, and was walking from back of the defendant's standing car at an ordinary walk, and, after having taken a step or two beyond it, was struck

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by the approaching car. He was in the centre of the south-bound track at the time. Mr. McFale, a disinterested witness, says it was but a few seconds from the time the boy passed him on his left until he was struck by the car; that it was done very quickly. It was done like a flash. He could not say whether the boy looked up to see if the car was coming, though it was the witness' impression that he did not. Witness, however, saw the boy make a spring or dash forward at the last moment, before he was struck, and was impressed that he had just caught a glimpse of the car. It would seem that, under such circumstances, with a car approaching at the rate of speed this was, apparently without the sounding of bell or gong, creeping up, as it were, to the side of the standing car which obstructed the view, even if the deceased had been an adult, the question of contributory negligence on his part would have been one for a jury. But this is not the case here, and it is not necessary to decide that question now. There is another element to be considered as affecting juridical action upon the question of contributory negligence in this case, and one that I think clearly makes it a question for the jury alone, and that is the fact that the plaintiff's intestate was a boy of tender years. He was described as a bright boy, but he was so young that naturally his powers of reason and judgment could be but partially developed. He had not passed far beyond the age of seven years, the period below which children have in many cases been held to be *non sui juris*, as a matter of law, and hence not chargeable with contributory negligence under any circumstances. Where there is a question whether the child is of sufficient age and discretion to be capable of some care for his own safety, the question of his capacity and its degree is for the jury. 2 Thomp. Neg., 1182. In an action by a child eight years old against an electric street-railway company for injuries caused by being run over by defendant's car, the question whether plaintiff was *sui juris* was held to be a question for the jury. (Stone v. Railroad Co., 115 N. Y. 104, 38 Am. & Eng. R. Cas. 489, followed.) Bennett v. Railroad Co. (Sup.), 37 N. Y. Supp. 447. And when a child has reached the age of discretion, and is considered *sui juris* as a matter of law, the degree of care and caution required of him will be no lighter than such as is usually exercised by persons of similar age, judgment, and experi-

Degree of
care question
for jury.

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ence; and whether that degree of care and caution has been exercised by the child in a given case is usually, if not always, a question of fact for the jury. 4 Am. & Eng. Enc. Law 46, and cases cited.

The counsel for defendant below, in the argument here, called the attention of the court to the fact that the question of contributory negligence of infants is usually one for a jury, but not always; citing *Thompson v. Railway Co.*, 145 N. Y. 196; *Nagle v. Railroad Co.*, 88 Pa. St. 35, and *Dietrich v. Railway Co.*, 58 Md. 347, 11 Am. & Eng. R. Cas. 115, where the court, as a matter of law, found the plaintiff's intestates to have been guilty of contributory negligence, and withdrew the cases from the jury. It is noticeable, however, that in those cases the intestates were all of the age of 14 years, and the facts showed that they had acted in entire disregard of the care and caution that might be reasonably expected from persons of their age and experience. The case in hand does not seem, by its circumstances, to arrange itself under the category of the cases named. The boy was much younger, and he was following the accustomed pathway for pedestrians at the intersection of public streets, and he approached defendant's westerly track, from behind another car of defendant that obstructed his view of the approaching car, and his gait was an ordinary walk. Taking these facts in connection with the other circumstances stated, the trial judge could not certainly have done less than he did, which was to refuse to nonsuit, and submit the question of contributory negligence to the jury.

The next assignment of error is based on an exception to the trial judge's refusal, after the defendant rested and the evidence was closed, to direct a verdict for the defendant, on the same grounds that the motion to nonsuit was based, and on the ground that this was an unavoidable and inevitable accident. The rule for the guidance of the trial judge upon this motion is practically the same as governs in the case of the motion to nonsuit, and has been already stated. The defendant's testimony raised a conflict as to some of the facts; the motorman having testified that the boy came running on the track diagonally towards the approaching car, and was struck before it had reached a line opposite the rear of the standing car, and that, to the best of his opinion, he had rung the gong before reaching Center street. He admitted that

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he did not have his car under control as he approached the standing car, because, as he stated, the latter had stopped so quickly and unexpectedly to him. Another of defendant's witnesses said the boy was on a smart walk, not a run, when he passed the rear of the standing car towards the track, and that the car came to a standstill one or two feet before reaching the rear of the standing car. Another testified it had passed several feet beyond the standing car before it was stopped. This conflict of testimony, and the admission of the motorman that he did not have his car under control, made it more clearly the duty of the judge to submit the questions of negligence on both sides to the consideration of the jury, so that the first two assignments of error must be overruled.

The next assignment of error is upon an exception to the trial judge's refusal to charge the following request of defendant, to wit: "It was not the duty of the moving car to stop before passing the standing car." Upon the subject-matter of this request, the judge charged as follows: "Now, upon this question as to the right of one car to pass another standing car on or near a crossing, taking in or discharging passengers, in my view of this case, it is not a question of law for the court to determine, whatever it might be considered to be in a case of a passenger alighting from a car, and then going behind the car, on his way to his destination, and another car suddenly coming upon him in the opposite direction, but the question here is as between the company and one attempting to pass across the street at a place where persons usually cross, where persons are in the habit of crossing, and a car is standing there, and the person crossing from the side of the street on which the car is standing in the rear of that car, and is met by a car passing in another direction; and I take it that the question here is for the jury to say, under all the circumstances, whether it was negligence upon the part of the motorman to run past that standing car, or not." Exception was also taken to this part of the judge's charge, and error assigned thereon, so that both of these assignments may be considered together.

It was insisted upon the argument by counsel of the defendant company that this court should have charged this request, on the ground that defendant owed to the plaintiff's intestate

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no other duty than that imposed upon any other vehicle in the street that might have caused such an accident, and that, if the only negligent act alleged was that the teamster driving such vehicle had passed a standing vehicle without first stopping, the court would not permit the case to go to the jury. If the request is to be taken as raising the general question, apart from the particular circumstances that it is not necessarily the duty of a moving car, upon a street railway, to stop before passing a standing car on the adjacent track, the judge would have probably answered the question in the affirmative. But the request could not have been rightly considered in that narrow aspect, for it is well settled that, in order to entitle a party to have the jury instructed as requested, the request must not only be correct in point of law, but applicable to the evidence. And the judge had a right to consider, as he evidently did, this request as intended to apply to the circumstances of the case as proven; and, so regarding it, the question was this: Could the judge say, as a matter of law, that it was not the duty of the defendant, under all the circumstances, to have so regulated the movements of its cars that its moving cars should stop before passing the standing car that was engaged in taking on or discharging passengers at this street crossing? Much that I have already said in reference to the court's refusal to nonsuit, and to direct a verdict, has application here, and I need not repeat it. Suffice it to say that, in the light of the authorities cited and of common experience, I think there is, at least, room for honest differences of opinion on the subject, and that negligence might be reasonably inferred. If so, no matter what the court might think, the question, as before stated, is one for the jury. The language of the trial judge above cited in submitting this question to the jury is not open to judicial criticism. The rules that should govern the jury in determining this question were carefully laid down with due regard to the rights of the defendant. I find no error under these two assignments.

Another assignment of error is based on the exception to the refusal of the judge to charge that, "if plaintiff's intestate entered upon the south-bound track without first looking for an approaching car, the plaintiff cannot recover." While not charging this request in terms, the judge charged that if the boy himself was guilty of negligence or the want of reasonable care, which

Street railway
crossing—
Negligence.

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contributed in any degree to that result, there could be no recovery, and, further, that "the rule is that, in crossing a street in which these cars are running, the pedestrian must exercise reasonable care to avoid injury to himself. He has no right to shut his eyes and walk across. He must use his senses, his eyes, his ears; and he must do that which reasonable, ordinary care requires of him; and it is a question for the jury to determine whether this boy was negligent there." He further charged that, "being a boy of tender years, he is held only to that degree of reasonable care and caution which his age and capacity permit him to use and exercise." Further on, the judge charged that, if the boy "saw the car coming, he was bound to use his eyes, to look, to see that there was danger there, and he could not go in front of it; and if he did, and accident and injury resulted to him, although the motorman may have been negligent, the defendant is held not liable in this accident." It may be said with reference to this request to charge that the proposition that one, to be in the exercise of due care, must look and listen before crossing a steam railway, is well established; but this duty does not apply with equal force to one in crossing the tracks of a street railway. *Railway Co. v. Block, supra*; *Lynam v. Railway Co.*, 114 Mass. 83; *Shea v. Railway Co.*, 50 Minn. 395; *Moebus v. Herrmann*, 108 N. Y. 354. In the case of *Shea v. Railway Co.*, *supra*, it was held that the failure to look up and down a street railroad upon a public street, before attempting to cross, is not, as a matter of law, negligence, as in case of crossing the ordinary steam railroad. And in *Moebus v. Herrmann, supra*, the New York court of appeals held the same doctrine. It is a matter of common knowledge that the double tracks of street railways lie close to each other, and that, after emerging from behind the standing car, the plaintiff's intestate could have had but a step or two to take to reach the opposite track, in front of the approaching car. And, even if the boy had looked, as soon as he passed this standing car, it is a question whether he could have saved himself from the impending danger. It may be that, without looking, the approaching car was within the range of the boy's vision, and that the spring he made in front of the car was under a sense of sudden terror that increased the hazard of his death. But it must be remembered that if a person placed by the negligence of another in a position of

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sudden danger, and under the influence of great terror, does an act which may contribute to his injury or death, such contributory negligence is not imputable to him, and will not bar a recovery. Whart. Neg., 304. I think, in view of the authorities named, and considering the extreme youth of the plaintiff's intestate, that the trial judge could not have properly charged this request, and thus held that, under the circumstances of this case, a failure of the plaintiff's intestate to look for an approaching car before entering upon the south-bound track would be negligence *per se*, that should bar a recovery; and I think the judge's charge upon the subject of care and watchfulness required of the plaintiff's intestate under such circumstances was fully up to the standard exacted by the law.

The only other assignments of error were those with reference to the jury's right, in estimating damages, to consider any pecuniary benefit which might arise by the earnings of deceased after he would have reached his majority. The judge held that the jury was not limited by the period of the minority of the deceased, but that, under the rules as laid down by him, they might extend their estimate through such period as they might determine would be a reasonable expectation of the continuance of his life. The assignments on this point were not insisted upon at the argument, and I need only say that I find no error in that part of the record. The judgment below should be affirmed.

MCCANN

v.

NEWARK & S. O. RY. CO.

(*Court of Errors and Appeals of New Jersey, June 15, 1896.*)

Negligence—Proximate Cause—Questions for Jury.—The plaintiff, being the only passenger in a street car, became suddenly ill, told the conductor she felt sick, and twice requested him to stop the car, so that she might get off. He failed to do so, and, going to the front of the car, began talking to the motorman. The plaintiff, growing worse, and becoming frightened and dazed rose to her feet, and staggered towards the rear of the car, and there fell, unconscious, through the door. *Held,*

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that whether the plaintiff was guilty of negligence, whether the conductor was guilty of negligence, and whether the plaintiff's injuries were the natural and proximate consequence of the conductor's negligence, were all questions of fact for the jury.

ERROR to Essex county circuit court. *Affirmed.*

R. H. McCarter, for plaintiff in error.

E. F. Morrow, for defendant in error.

DIXON, J.—The questions raised on this writ of error relate to the refusal of the learned justice at the trial to nonsuit the plaintiff, or to direct a verdict for the defendant. Case stated.
The circumstances shown on behalf of the plaintiff were these: The plaintiff, a girl 18 years old, was the only passenger in the defendant's street car. While there, she became sick, and, going to the car door, she told the conductor that she was sick and asked him to stop the car, so that she might get off. He told her to sit down, and she would feel better after a while. She sat down, but felt sicker all the time. Presently the conductor passed through the car, and she again appealed to him to stop; but he looked at her, smiled, went on to the front of the car, and began talking to the motorman. She then felt dizzy and sick at the stomach, became frightened and dazed, got up from her seat, and staggered towards the rear door, for the purpose, she said, of seeing whether she could not get some one on the street to stop the car, and fell unconscious through the door, remaining unconscious for several weeks. The car had then 670 feet to go before reaching the end of the electric route, at which point the plaintiff was to be transferred to a horse car of the defendant, for carriage about a mile further, to her destination.

On these circumstances, the defendant takes three positions: That negligence on the part of the plaintiff is shown; that negligence on the part of the defendant is not shown; and that, if it is, the plaintiff's injury is not the natural and proximate consequence of such negligence.

1. As to the plaintiff's negligence: In view of her youth, her illness, and her mental disorder, we cannot say, as matter of law, that she was bound to exercise the same degree of care and forethought as persons of mature years in the full possession of their faculties would ordinarily exercise; and it

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was for the jury to determine whether, under the peculiar conditions then existing, she used such prudence as it was reasonable to require.

2. As to negligence imputable to the defendant: It was lawful for the jury to find that, when the plaintiff made her second appeal to the conductor, he was apprised of her serious illness, or, at least, should have inquired further as to her condition. They also had the right to conclude that, on perceiving or informing himself of the extent of her sickness, it became his duty either to stop the car, so that she might alight as she requested, or else to afford her such reasonable attention as would save her from harm because of her detention in the moving vehicle. He did none of these things, but passed her by heedlessly, and left her utterly uncared for, when there was no other person at hand to render her assistance. Such conduct would not fulfill the duty of the defendant as a carrier of passengers. It is but a corollary from the principle which enjoins upon these carriers reasonable care for the security of their passengers that when, through sudden illness, a passenger becomes less able to look after his own safety, and that fact is made known to the proper agent of the carrier, the latter must exercise towards the passenger a greater degree of care than is demanded in ordinary circumstances. *Sheridan v. Railroad Co.*, 36 N. Y. 39; *Railroad Co. v. McClurg*, 56 Pa. St. 294; *Railroad Co. v. Weber*, 33 Kan. 543, 21 Am. & Eng. R. Cas. 418; *Croom v. Railway Co.*, 52 Minn. 296.

The last point for consideration is the connection between the negligence of the conductor and the plaintiff's injuries. In suits of this character, the law requires that the damages chargeable to the defendant shall be the natural and proximate result of his delinquency. The term "natural" imports that they are such as might reasonably have been foreseen. The term "proximate" indicates that there must be no other culpable and efficient agency intervening between the loss and the defendant's fault. *Wiley v. Railroad Co.*, 44 N. J. L. 247. Of course, it is not necessary that the wrongdoer should be able to anticipate the very occurrences which resulted from his laches; it is enough if, after they have happened, they are seen to have followed from his misconduct in the natural course of things, and within the range of reasonable probability; and it must generally be left to the jury

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to determine, according to the circumstances, whether the facts fit the standard of naturalness. *Hammill v. Railroad Co.*, 56 N. J. L. 370, 378. In the present case the behavior of the plaintiff was not necessarily either an unnatural or an unlikely consequence of the conductor's disregard of her requests and her condition. Being seized with a sudden and increasing sickness, and impressed with the thought that she must leave the car for relief, the jury might deem it both natural and probable that, when the conductor refused to stop the car, she should seek other means of attaining her object, and might, in her confusion, adopt measures ill suited to her purpose. We cannot adjudge that such a conclusion was illegal.

The question whether the injuries were the proximate effect of the conductor's neglect also lay, we think, within the province of the jury. If they determined that the acts of the plaintiff, after the conductor failed to stop the car at her second request, were not blameworthy, then his negligence was, in a legal sense, the proximate cause of the ensuing accident. The fact that between the defendant's fault and the plaintiff's injury there are intermediate acts of other persons, even of the plaintiff, will not render the injury too remote for legal contemplation and redress, if the intervening acts are not wrongful, and either naturally follow upon the defendant's misconduct, or merely furnish the conditions on which that misconduct operates. Recent instances of this nature are common in our own reports. *Finegan v. Moore*, 46 N. J. L. 602; *Houston v. Traphagen*, 47 N. J. L. 23; *Driscoll v. Carlin*, 50 N. J. L. 28; *Railway Co. v. Lee*, 50 N. J. L. 435; *Buchanan v. Railroad Co.*, 52 N. J. L. 265; *Phillips v. Library Co.*, 55 N. J. L. 307; *Railroad Co. v. Marion*, 57 N. J. L. 94. We find no error in the record, and the judgment must be affirmed.

GUMMERE, LIPPINCOTT, LUDLOW, VAN SYCKEL, and NIXON, JJ., dissent.

State v. Board of Assessors

STATE *ex rel.* ST. CHARLES ST. R. CO.

v.

BOARD OF ASSESSORS *et al.*
(No. 12,073.)

(Supreme Court of Louisiana, June 15, 1896.)

Assessment for Taxation—Determination of Net Earnings.—Under the statute, the earning capacity of the plaintiff company forms a basis for estimating values. The assessment was made by taking gross earnings, and deducing therefrom the cost of operating the road. *Held*, that payment of debts secured by bond and mortgage of a date long anterior was not a running annual expense; that, under the terms of the statutes, it was not deductible from the gross annual earnings of the year 1895, to fix the net earnings of that year, and the consequent value at the time of the franchise. Franchises are property. And amounts applied from the gross receipts to the payment of property bought many years prior are taken account of in fixing net revenues. The franchise was bought for cash. The amount needed to this end was borrowed at the time, and is now bonded, and paid from year to year. These past liabilities are not annual expenses of operation, lessening annual revenues. The liability on property does not, in assessing, constitute an offset.

APPEAL from civil district court, parish of Orleans. *Affirmed.*

The relator, alleging that it had made application to the board of assessors to reduce its assessment (also, to the committee of the common council on the revision of assessments, for a reduction of its assessment), sued for a writ of mandamus against the board of assessors to reduce upon the assessment rolls for the state and parish, for the year 1895, the assessment of its franchise from \$816,200 to \$566,200.

Case stated. The facts are that the plaintiff paid \$300,000 cash for its franchise. It afterwards issued bonds for this amount, payable annually, at the rate of \$15,000.

The dividends for 1894, a basis for the assessment of 1895, was	\$43,752
Amount paid on the bonds.....	15,000
	<hr/>
	\$58,752
	<hr/>

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On a principal at 6 per cent of.....	✓979,200
There was deducted other property, in regard to which no issue was raised.....	163,000
Balance.....	<u>\$816,200</u>
The claim of the relator is that there should be deducted from the last amount, as not subject to taxation, a sum sufficient to produce the \$15,000 used in redeeming bonds redeemable each year, viz.....	<u>\$250,000</u>
Leaving for assessment balance of.....	\$566,200

In other words the relator claims that the annual payment of \$15,000 on its bonded debt is a running expense of the road, and contends that it should be deducted, in determining the earning capacity of the road. The respondents, on the other hand, contend that the amount of dividends paid by the company to the shareholders, plus the amount paid on the bonded debt, is the earning capacity of the road. An unimportant clerical error was corrected by the district court. Save that correction, the relator's application was rejected. From the judgment the relator appeals.

Harry H. Hall, for appellant.

Samuel L. Gilmore, City Atty., and *Walter B. Sommerville*, Asst. City Atty., for appellees.

BREAUX, J. (after stating the facts).—The board of assessors is ordered, in assessing the franchise of a corporation, to take its earning capacity as a basis of value. The word "earning," in the statutes, is a broader term than "the amount of dividends paid by the company to the stockholder." Of course, in determining the proper assessment of a corporation, such as plaintiff, the running expenses are to be deducted. They, however, do not include an Assessment for taxation. amount to redeem outstanding bonds. In the matter of assessments, these bonds have naught to do with the value of the property. If they had, a corporation buying a franchise for cash would be at greater disadvantage than a corporation buying for cash, and afterwards issuing bonds for the amount of borrowed money paid for the franchise. An indebted corporation for such bonds would always be in a better situation as to assessment, although generally, under the assessing statutes, debts are not deducted in

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determining the assessment. The franchise is as valuable to a corporation owing bonds as it would be to one not indebted on bonds. Moreover, this indebtedness at first was not an annual indebtedness. The plaintiff was the adjudicatee of the franchise for an amount in cash. To meet the requirement of the adjudication, an indebtedness was incurred the year that it became the adjudicatee. It is no part of the running expenses of years subsequent. In the cases heretofore decided by this court, to which our attention is directed by plaintiff's counsel, the assessment was measured by the amount of dividends paid to the shareholders. There was no question of other amounts earned applied to the payment of bonds securing the indebtedness of a previous year. That question did not arise in the argument at the bar, or in the discussions of the court. "Net earnings" are defined, substantially, in *Union Pac. R. Co. v. U. S.*, 99 U. S. 402, 428, and in *U. S. v. Kansas Pac. Ry. Co.*, *Id.* 455, 460, as the surplus of the transportation earnings above operating expenses. The phrase has also been defined, in a general way, as the excess of the gross earnings over the expenditures in producing them, less the expenditure of capital laid out in constructing and equipping the road. Under each definition, each year stands by itself. We do not think that they cover, as an amount to be deducted from the gross receipts, an indebtedness of a prior year. The company is not, as contended, paying taxes upon a debt it owes, as urged by counsel for relator, but upon the value of a franchise, as shown by dividends and payment on its bonded indebtedness. They are its earning capacities, not affected by present loans to capital account of many years prior. Under the terms of the statute, we think the judgment should be affirmed. It is affirmed.

ON APPLICATION FOR REHEARING.

(June 29, 1896.)

After having reconsidered the points involved in this case, and after having carefully read the elaborate brief of energetic counsel, we are still of the opinion that the bonded indebtedness of the company, which represents the purchase price of their franchise, and dates a number of years go, is not, as to the annual payment of interest on this debt, a part of the

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annual necessary expenses of the business. The earning capacity of a company is not such an amount as remains after payment of the whole debt of the company, or a part. It is the excess of receipt over expenses. To illustrate: Upon property largely incumbered, large annual profits may be made, and for this reason it must have considerable value. The value is not, or should not be, affected by prior indebtedness incurred. It may be a hardship upon this and other similar companies to make the earning capacity the basis of value of the property assessed, instead of taking the market value of the stock. A consideration of that view is not within our jurisdiction. The remedy is within the legislative, and not the judicial, control. As relates to the value of the stock, the facts do not place that question before us for decision. The case was tried with reference to the earning capacity of the road, as establishing value. Payment of the debts of the shareholders does not affect the value. Under the statute, the life of the franchise, if it does not affect the value of the property, is not good ground to reduce the assessment. Rehearing denied.

LOUISVILLE & N. R. CO.

v.

QUEEN CITY COAL CO.

(Court of Appeals of Kentucky, May 3, 1896.)

Liability of Carrier for Failure to Furnish Cars.—Where a railroad company, by reason of a strike among the employees of certain coal companies, transferred its coal cars and engines to another division of its road in order to supply its engines with coal, it is not liable for failure to furnish cars to a coal company, on the division where the strike prevails whose miners had not struck, for the shipment of the company's coal.

APPEAL from Laurel county circuit court. *Reversed.**J. W. Alcorn and J. A. Craft, for appellant.*

PAYNTER, J.—East Bernstadt is a station on the Knoxville Branch of the Louisville & Nashville Railroad Company, and situated within the territory wherein coal mining is carried on, known as the "Laurel District." The Queen City Coal Company operated a mine, and shipped its

Case stated.

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coal from East Bernstadt, on appellant's road. After the middle of August, 1887, until some time in the following September, the appellant refused to furnish appellee coal cars for the shipment of coal. It had been the custom of the appellant to so furnish coal cars to the appellee previous to that time. On or about the 16th of August, 1887, appellant's agent gave the appellee notice that no cars would be furnished for the shipment of coal to private persons. This action was instituted by appellee to recover damages of appellant on account of such refusal. The appellant is a common carrier, had provided itself with cars and engines suitable for the transportation of coal, and by that method, and in receiving and carrying coal, had notified the public it was engaged in the business of carrying coal. The fact that it carried such coal as was offered for shipment before and after the time mentioned showed that it had provided itself with reasonable facilities and appliances for the transportation of coal from the Laurel district.

It is the duty of a common carrier to acquire facilities for the transportation of commodities which he gives the public to understand he is engaged in transporting. In doing so, he is only required to place himself in such situation as will enable him to carry the quantity of such commodities as may be ordinarily expected to seek transportation. He is not required to anticipate an unprecedented and unexpected press of business, and to keep extra rolling stock to meet such contingency. Hutch. Carr., § 292. "He may refuse goods beyond the facilities he possesses for transporting them. When, by reason of unusual pressure of business, the rolling stock of a railroad is inadequate for the transportation of freight, the company may decline to receive, without incurring any liability." Lawson, Rights, Rem. & Prac., § 1804. The same doctrine is enunciated in *Railway Co. v. Smith*, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421, and *Thayer v. Burchard*, 99 Mass. 508.

A strike of the coal miners in the Laurel district (except the mines of the appellee) began between the 1st and 15th of August, 1887, and continued until some time in the following September. The uncontradicted testimony in this record shows that the Louisville & Nashville Railroad Company procured the supply of coal from this district for use of the

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engines on certain parts of its road; that, when the strike began, this supply failed; that it was then compelled to take much of its rolling stock used for transportation of coal from the Laurel district to the Henderson Division, to transport coal from the mines on that division, to supply coal for its engines; that the rolling stock which had been used on the Knoxville Branch for the transportation of coal was necessarily used for the purpose of carrying coal for the use of its engines, for carrying cross-ties for its road, etc.; that the change of base of supplies caused delay in getting the coal cars from the Knoxville Branch to the Henderson Division; that the distance from the Laurel mines to Louisville, where the coal was carried for distribution to the engines, was 150 miles, and from mines from which coal was carried over the Henderson Division it was 220 miles, thus requiring more cars and engines to transport the needed coal; that, soon after the strike ended, the railroad began to furnish the appellee and other coal operators in the Laurel district with cars necessary to transport this coal. These facts excused the appellant in its refusal to furnish appellee with cars to carry coal while the conditions existed which we have related. The only testimony introduced to contradict the undisputed testimony for the appellant is the testimony of some witnesses to the effect that, on occasions during the strike, some empty coal cars were seen in switches on the Knoxville Branch. Admitting this to be true, it does not contradict the testimony of the witnesses of the appellant materially. Some of these cars might have been out of repair; others awaiting engines to haul them to other coal mines on the Henderson Division; and the others awaiting the necessary business of the appellant. After the strike began, all local coal trains were discontinued. The appellant was not bound to take an engine, gather up coal cars, and transport the coal of the appellee. The appellant owed a duty to the public to keep its freight and passenger trains on its lines of road running. It could only do this by obtaining the necessary fuel for its engines. To obtain this, it was necessary, as appears from the record, to change rolling stock from the Knoxville Branch to the Henderson Division. It was far more important that the appellant should continue its general freight and passenger business on such lines as were supplied with fuel from Louisville than to transport the coal for the appellee. The evidence offered by the appellee did

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not in a material degree contradict that of appellant, and the verdict is not supported by the evidence. For that reason a new trial should be granted.

We have not considered the question as to the measure of damages had the plaintiff's evidence sustained the verdict, because the rule as stated in the opinion of the superior court must control in this case, regardless of our view as to the correctness of the opinion of that court on that question. The judgment is reversed, with directions to grant the appellant a new trial, and for further proceedings consistent with opinion.



STATE (Roebeling, Prosecutrix)

v.

TRENTON PASSENGER RAILWAY CO., CONSOLIDATED, *et al.*

(Court of Errors and Appeals of New Jersey, June 15, 1896.)

Change of Motive Power Does Not Per Se Create Additional Easement.—The substitution of electric motors with the trolley system for horses on street railroads does not *per se* create an additional easement on the street.

Erection of Poles in Streets.—The setting of poles in a street by a duly chartered street railroad company is within the customary and legitimate use of the lands of abutting owners on a public way, and does not constitute a taking of private property without compensation.

Unlawful Injury to Abutting Owners.—If the privileges granted by a state statute, under which a street-railroad company holds its charter, are made the occasion of unlawfully injuring the owners of abutting property, such acts of the company are *ultra vires*, and are redressible by action at the suit of the injured party.

ERROR to supreme court. *Affirmed.*

William M. Lanning and *Charles E. Gummere*, for plaintiff in error.

Joseph Coult and *James Buchanan*, for defendant in error.

DEPUE, J.—This writ brings up a judgment of the supreme court sustaining an ordinance entitled “An ordinance to authorize the Trenton Passenger Railway Company, Consolidated, to use electric motors as the propelling power of its

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cars through certain streets and avenues in the city of Trenton, and to provide for the erection of poles and the stringing of wires thereon to supply electricity to the motors," passed by the board of public works of the city of Trenton, February 8, 1894, and approved by the mayor February 12, 1894. The ordinance was passed in virtue of the act of 1893 (P. L. 1893, p. 241). The first section of that act Case stated. authorizes street or horse railroad companies to use electric motors as the propelling power of their cars, instead of horses, provided consent of the municipal authorities be first obtained. The second section empowers the municipal authorities to authorize the use of poles to be located in the public streets, with wires, etc., for the purpose of supplying the motors with electricity, and to prescribe the manner in which, and the places where, such poles should be located. The ordinance is, in all respects, in compliance with this statute, so far as is material to this case, and is in conformity with the powers of the city government to regulate the use of public streets. The prosecutrix is the owner of a lot on the southerly side of West State street, between Warren and Calhoun streets. Her title extends to the middle line of the street, subject to an easement in the public for the purposes of a public highway. The reasons filed for setting aside this ordinance are: First. Because the erection of poles and the stringing of wires thereon upon the lands of the prosecutrix, in West State street, in the city of Trenton, for the purpose of supplying electricity to the motors to be used by the Trenton Passenger Railway Company, Consolidated, in propelling their cars over and along their railroad in said city, without the consent of the said prosecutrix, and without payment to her therefor, is in violation of the constitution of the state of New Jersey, in that it is a taking of private property for public use by a private corporation without compensation first made to said prosecutrix, and therefore an ordinance authorizing the erection of such poles, and the stringing of wires thereon, for such purpose, without providing for compensation for land taken, is illegal and void. Second. Because the construction and operation of an electric railroad in the public streets of Trenton, upon the lands of the prosecutrix therein, without her consent, and without payment to her therefor, is in violation of the constitution of the state of New Jersey, in that it is a taking of private property for public use by a private corporation with-

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out compensation first made to the said prosecutrix; and therefore an ordinance authorizing the construction and operation of such a railroad, without providing for compensation for land taken, is illegal and void. Third. Because the said ordinance is unreasonable, so far as it authorizes and permits the construction and operation of a double-track electric railway, to be operated by what is known as the "trolley system," upon West State street, between Warren and Calhoun streets, in the city of Trenton. The ordinance, in prescribing the places in which the company's poles should be located, fixed the location of two of its poles on the sidewalk in front of the property of the prosecutrix, just inside of the curb line, and the company has erected these two poles at the places indicated. The evidence shows that the cars used by the company weigh $7\frac{1}{2}$ tons, and are 30 feet in length, and that ordinary horse cars weigh $1\frac{1}{2}$ tons, and are 14 feet in length, and that the speed with which the company runs its cars in the section of the street on which the property of the prosecutrix is located is from $7\frac{1}{2}$ to 17 miles per hour, with a mean average speed, on the 46 trips observed, of 12 miles per hour. There is also evidence in the depositions that by reason of the weight of the cars, and the speed at which they are run, they occasion, at times, vibrations, to the extent of rattling the windows in the dwellings fronting on the street.

The prosecutrix's standing in this proceeding is that of the owner of property complaining of an invasion of her property rights. The ordinance being in compliance with the statute, the question is whether the act of 1893 is within the power of the legislature. In considering this question it must be admitted, at the outset, that the transmission of passengers with increased speed and greater comfort is a great public benefit. This is equally true of the lines of railroads that traverse our state and penetrate into every section, and of the diversion of waters to create waterways for carrying freight, or to supply water for use in the large cities and towns. It is also conceded that the erection of poles with wires strung thereon, in the present state of the sciences, is necessary to accomplish the purposes contemplated by this legislative provision. But no considerations of public advantage should be permitted to predominate over the rights of private property,

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which, by a constitutional inhibition, cannot be taken for a public use without compensation. As was said by Chancellor Green in *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75-80, "Nothing can be claimed on the ground that city railroads are a great public convenience and benefit. If they are so, the public can afford to pay for it. That is certainly no reason why individual property should be taken for public use." This constitutional provision has uniformly been liberally construed for the protection of private property. Not only an actual taking, but also the destruction of private property either total or partial, or the diminution of its value by the act of the government, directly and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking, within the constitutional provision, which can only be exercised under the right of eminent domain, on just compensation made. *Water-Power Co. v. Raff*, 36 N. J. L. 335; *Railroad Co. v. Angel*, 41 N. J. Eq. 316-329, 26 Am. & Eng. R. Cas. 559. The title to the soil over which highways and streets are laid remains in the owner of the fee, subject only to the public easement. "The right of the public in a highway," said Chief Justice BEASLEY in *State v. Laverack*, 34 N. J. L. 206, "consists in the privilege of passage, and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains, and lay gas and water pipes. These subordinate privileges are entirely consistent with the primary use of the highway, and are no detriment to the landowner." This principle has been extended to the use of streets in populous districts, to appliances for distributing water, light, heat, power, and matters of general necessity or convenience. *Lewis, Em. Dom.*, § 126. In *Stoudinger v. City of Newark*, 28 N. J. Eq. 187, 446, it was held, against the landowner's objection, that the use of the street for sewers was a legitimate use, consistent with the purpose for which the land was appropriated. The uses of the streets for such and similar local and public benefits have, from an early period in municipal governments, been so usual and customary as that they may be regarded as having been in contemplation when the streets were laid out or dedicated as servitudes upon lands within and abutting upon streets, to be put in force as occasions arise for their use, which confer a benefit immediately upon the adjacent lands.

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But it is not every use of a public street that is lawful, as against the rights of the owner of the fee, though such use may promote public benefit. Thus it was held in *State v. Laverack*, that the legislature had not the power, under the constitution of this state, to authorize a market to be held in a public street of a city without providing compensation to the proprietors of the contiguous lands, who owned to the centre of such street, notwithstanding that such market was designed for public use, and inured to a public benefit. In *Starr v. Railroad Co.*, 24 N. J. L. 592, the subject was discussed by Mr. Justice HAINES, who explicitly held that the constitution of this state prevented the legislature from granting to a railroad the right to use a public highway as the bed of its railroad, without compensation to the owner of the soil, and his opinion on that head has uniformly and frequently been adopted as a correct exposition of the constitutional right of the owner of the soil within public highways. In both the cases cited the prosecution was at the instance of the owner of abutting lands, whose title extended to the centre line of the highway. In *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75, the power of the legislature to authorize the use of a public street for street railways was directly under consideration. The bill was filed by owners of lots abutting upon the street, having title to the middle of the street, to enjoin a horse-railroad company from the construction of its railroad through the street under the authority of its act of incorporation. Chancellor Green, in his opinion, quoted with approbation the opinion of Mr. Justice HAINES in *Starr v. Railroad Co.*, and affirmed the incapacity of the legislature, under our constitution, to appropriate lands within public highways to any other than their legitimate use as highways without compensation to the owners of the soil. The learned chancellor distinguished the use of a street for a horse railroad from its use by an ordinary railroad, and justified the use of part of the highway for street railroads in this language: "They are ordinarily, as in this case, required to be laid level with the surface of the street, in conformity with existing grades. No excavations or embankments to affect the land are authorized or permitted. The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinarily less, than that produced by omnibuses, and

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other vehicles in ordinary use. Admit that the nature of the use, as respects the traveling public, is somewhat variant; how does it prejudice the landholder? Is his property taken? Are his rights as a landholder affected? Does it interfere with the use of his property any more than an ordinary highway?" It will also be observed that the chancellor, in his subsequent language, expressly repudiated the idea that the rights of landowners in the premises could be affected by the fact that city railroads were a great public convenience. The extract made from the opinion of the learned chancellor has frequently been referred to with approval by the courts of this state. The ground of the chancellor's decision denying the injunction was that the complainants' rights as owners of lands were not in fact prejudiced or interfered with by the use of the streets by a street railroad operated in the manner in which the railroad in question was authorized to be operated, to a greater degree than they would be affected by their use as an ordinary highway; in other words, that the mode in which the company was authorized by its charter to use the streets of the city in fact created no additional servitude upon the lands. The defendant was incorporated as a "horse-railroad company," with power to lay rails and operate a railroad through Clinton and State streets in the city of Trenton. P. L. 1859, p. 266. The act of 1893, and the consent of the city authorities, by the ordinance, authorized the company to substitute electric motors in the place of horses, as the propelling power of its cars. Neither the statute of 1893, nor the ordinance, conferred upon the company any rights beyond those vested in it by its charter, except in allowing a change in the motive power to be applied to its cars. The change in the motive power of the cars did not necessarily occasion any injurious effects upon the prosecutrix's property. Cars of the same pattern and size of the cars used by the company as a horse railroad, and driven with no greater speed, might have been adapted to the new motive power. I agree with those cases in our courts which hold that the substitution of electric motors with the trolley system for horses on street railroads does not *per se* create an additional easement. The injury to property which would give the prosecutrix a legal ground of complaint does not spring from the kind of motors used.

The statute also empowers the municipal authorities to

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authorize the use of poles in the streets, with wires thereon to supply the motors with electricity, and to prescribe the places in which such poles should be located. Two of these poles were located by the ordinance on the complainant's lands, on the sidewalk, inside of the curb. Holes were dug and poles were set in the ground by the company at the places indicated by the ordinance. The contention of the prosecutrix is that the setting of these poles on her lands constituted a permanent, exclusive, and continuous use of her lands, not within the customary and legitimate use of the lands of abutting owners on a public way, and was to that extent a taking of private property such as is interdicted by the constitution, except upon just compensation made, and that an ordinance authorizing the erection of poles, and the stringing of wires thereon, for the purpose of supplying the company's motors with electricity, without providing for land taken, is illegal and void. The statute which underlies this ordinance does not confer upon these companies the right to acquire private property by the exercise of the right of eminent domain. By that act the legislative purpose was to confer upon these companies the right to erect poles, and use the trolley system, so far as the public easement was concerned, and made it the duty of the municipal government to fix and designate the location of the poles with a view to the public convenience in the use of the streets; leaving the several companies, if their necessities or convenience require the appropriation of private property, to obtain the consent of landowners by agreement. In withholding the power of eminent domain, the legislature intended that, if private property was necessary or desirable, these companies should acquire rights in private property by the consent of the owners, and not take it *in invito*. The act, in withholding the power of condemnation, may not effectuate all that these companies, in particular instances, desire for the scheme of improvement they have embarked upon; but the act, by its imperfection in this respect, is not rendered wholly void. Injuries by vibrations caused by the weight of the cars of the company, combined with the speed at which they were run, belong to the same class of injuries as that which may arise from the setting of poles. The owner of lands abutting upon a street holds his title subject to the inconveniences and injurious consequences, including those

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streets.

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occasioned by noise and vibration, resulting from a user which is consistent with the legitimate and proper use to which these public thoroughfares are devoted. But such injuries as are caused by a manner or mode of user which is not justifiable on the ground that the *locus in quo* is a public street will lay the foundation for, and are redressible by, action. In *Beseman v. Railroad Co.*, 50 N. J. L. 235, and '*Id.*', 52 N. J. L. 221, the immunity of a corporation exercising public franchises from liability for incidental damages occasioned to abutting lands was limited to such damages as were occasioned by the exercise of its franchises with care and skill in all respects. Neither the act of 1893, nor the ordinance under review, purported to legalize the size or weight of cars to be provided by the company, nor the speed at which they should be run. The privileges granted were capable of being employed without an excessive or unusual injury to lands abutting upon the streets. If the privileges granted by this statute are made the occasion for unlawfully injuring the owners of abutting property, such acts of the company are *ultra vires*, and redressible by action at the suit of the injured party. The act of the legislature is a general law for the equipment of street railways throughout the state and the ordinance under review is, in those respects which are material to this controversy, similar to the ordinances under which many streets railways have been equipped and are operated. A decision that such ordinances, and the statute under which they were made, were invalid, for the reason that, in a particular case before the court, it should appear that these privileges have been made the occasion for unlawfully injuring private property, when such injury was not the direct product of the ordinance, would be disastrous to public interests, and not warranted in law. For such injuries the remedy of the party injured is by action. If the acts done under color of the ordinance or the statute be found to be an unlawful invasion of the rights of private property, an action will lie, in which neither the ordinance nor the statute would be a justification. *Costigan v. Railroad Co.*, 54 N. J. L. 234, 239, 240.

Unlawful injury to abutting owners.

The remaining reason assigned for setting aside this ordinance is that it is unreasonable, so far as it authorizes and permits the construction and operation of a double-track railway to be operated by the trolley system upon West State

street between Warren and Calhoun streets. The title of the ordinance relates solely to the use of electric motors, and the erection of poles with wires thereon to supply electricity to the motors. The permission granted to the company is to use their motors and appliances "on its tracks, which are hereby authorized to be laid," enumerating certain streets, among which is State street, from the easterly limits to the westerly limits of the city. The ordinance recognizes double and single tracks, which were probably laid under the authority of the company's original charter. Be that as it may, nothing appears in the case to show that there is anything in the situation of West State street, either in its width or surroundings, that makes a double track in the street, with cars operated by the trolley system, in itself injurious or unreasonable, either with respect to the public convenience, or to private property. Nor does it appear that the track of the company's railroad next to the property of the prosecutrix has been placed so near the curb line as unreasonably to interfere with access to her property, or the enjoyment of those privileges which owners of abutting lands are entitled to enjoy in a public highway in front of their premises.

The ordinance, in its second section, reserves to the board of public works the right to make reasonable regulations governing, among other things, the number of cars in a train, and in the sixth subdivision of the nineteenth section trail cars are mentioned. Under these sections the company appear to claim a right to run trains made up of a motor car and one or more connected passenger cars, called "trailers." Trains so made up were run during the state fair as through trains to the fair grounds, with instructions to the company's employees not to carry local passengers. It may be difficult to justify such a use of the streets upon the theory upon which the use of streets for street railways has been justified as a legitimate use. But there is no reason assigned which brings this part of the ordinance under review.

Finding no infirmity in the ordinance, or in the statute in virtue of which it was passed, within the reasons assigned for setting aside the ordinance, I think the judgment of the supreme court sustaining it should be affirmed.

NOTES

Whether Trolley an Additional Burden.—It has been contended that an electric street railway, operated by what is known as the trolley

system, with its poles and wires and its peculiar track, constituted a new servitude upon the land in the street ; but the contention has not been sustained, and electric railways are considered to be not different from other street railways in this regard. The question whether an additional burden is imposed or not cannot be determined from the motive power employed. *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380, 46 Am. & Eng. R. Cas. 76 ; *Koch v. North Ave. R. Co.*, 75 Md. 222, 50 Am. & Eng. R. Cas. 401 ; *District Att'y v. West Chester*, 9 Pa. Co. Ct. Rep. 546 ; *Lockhart v. Craig St. R. Co.*, 139 Pa. St. 419, 47 Am. & Eng. R. Cas. 57, 64, note (injunction denied) ; *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556, 43 Am. & Eng. R. Cas. 215 ; *Taggart v. Newport St. R. Co.*, 16 R. I. 668, 43 Am. & Eng. R. Cas. 208 ; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 46 Am. & Eng. R. Cas. 608 ; *Nieman v. Detroit Suburban St. R. Co.*, 103 Mich. 256, 1 Am. & Eng. R. Cas. N. S. 174 ; *Dean v. Ann Arbor St. R. Co.*, 93 Mich. 330 ; *People v. Fort Wayne, etc., R. Co.*, 92 Mich. 522 ; *Ogden City R. Co. v. Ogden*, 7 Utah 207 ; *Tracy v. Troy, etc., R. Co.*, 54 Hun (N. Y.) 550 ; *Potter v. Saginaw Union St. R. Co.*, 83 Mich. 295 ; *Mt. Adams, etc., R. Co. v. Winslow*, 3 Ohio C. Ct. 425 ; *Melton v. East Cleveland R. Co.*, 22 Wkly. L. Bull. (Ohio) 67.

Where the owner of a corner lot owns the fee to the centre of the street, and the electric railway company has its track wholly on the opposite side of the centre of the street, he is entitled to no relief other than an order perpetually enjoining the company from thereafter erecting in front of his premises any poles or wires without his consent. *Barber v. Saginaw St. R. Co.*, 83 Mich. 299.

Electric-Railway Wires Distinguished from Telegraph Wires.—In *Taggart v. Newport St. R. Co.*, 16 R. I. 668, 43 Am. & Eng. R. Cas. 208, the court took pains to distinguish the case in hand from those relating to telegraph and telephone wires. DUFFEE, J., said : “ Assuming telegraph and telephone poles and wires do create a new servitude, we do not think it follows that the poles and wires erected and used for the service of the street railway likewise create a new servitude. Telegraph and telephone wires are not used to facilitate the use of the streets where they are erected for travel and transportation, or if so, very indirectly so ; whereas the poles and wires here in question are directly ancillary to the uses of the streets, as such, in that they communicate the power by which the street cars are propelled.” Commenting on this case, Judge Dillon observes : “ The distinction mentioned is so fine as to be almost impalpable, and it suggests serious doubts whether both conclusions are sound and reconcilable. The general subject awaits further development and settlement.” 2 Dillon Mun. Corp. (4th ed.), § 734, c. The same distinction is made in *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380, 46 Am. & Eng. R. Cas. 76.

See, as to telegraph poles, 25 Am. & Eng. Enc. of Law, p. 753.

Crescent City R. Co. v. New Orleans & C. R. Co.**CRESCENT CITY R. CO.***v.***NEW ORLEANS & C. R. CO.***(Supreme Court of Louisiana, April 20, 1896.)*

Street Railways—Occupancy of Another's Tracks.—In order to authorize one street-railway company to occupy the tracks of another, there must be legislative permission for the same, or it must result from such necessary implication from the grant that an abandonment of the grant would necessarily result from the nonoccupancy of the roadbed of the street railway first occupying the street.

APPEAL from civil district court, parish of Orleans.
Affirmed.

Farrar, Jonas & Kruttschnitt, for appellant.

Henry P. Dart, for appellee.

MCENERY, J.—The plaintiff and defendant are street-railway corporations. The latter was in position on Carrollton avenue, when a change of route was granted to the plaintiff corporation to run through the same street, on the neutral ground. This expression, “neutral ground,” has occasioned some confusion in the interpretation of the grant to plaintiff. “Neutral ground” had its origin in its application to the unclaimed part of Canal street, which was the dividing line between two municipalities. It has no significance in its application to other streets. The center of Carrollton avenue was occupied by a gravel road before the defendant's road was located thereon. On either side there was a wide space, unoccupied, but used at times as a playground. The city engineer located the plaintiff's road, under the grant to them to pass through Carrollton avenue, on what he then construed to mean the neutral ground. This location was accepted by the plaintiff, and it commenced work for the construction of its track as located. This location did not interfere with the defendant's tracks. The plaintiff, for some reason, abandoned work on its location; and about a year

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afterwards the city council, by ordinance, declared the neutral ground to be the center of the street through which the defendant's railway was located. In this ordinance there is no grant to the plaintiff road to run over the tracks of defendant. In plaintiff's brief it is stated that the facts make a street neutral ground, and not any ordinance of the city council. To the time that the ordinance declaring the center of the avenue, on which defendant's road was located, neutral ground, the neutral ground of the avenue was the unoccupied part of the street. This is the testimony of the city engineer. Williams, an engineer, who had always lived in Carrollton, and on Carrollton avenue, says in his testimony that when the grant to plaintiff was made the sides of Carrollton avenue were grass-grown, and used as a playground, which up to 1892 was considered as neutral ground, so far as appearances warranted such designation. From his earliest recollection the center of the avenue was occupied by a roadway, until a graveled roadway was built. It was after the making of this gravel roadway that defendant's road was constructed on it. Therefore there is no force in the argument that, because a part of what was once neutral ground is now graveled and improved, it could not have been the intention of the city government to permit a road to be built on it. There is no question of the intention of the city council involved in this question. It is a fact at issue whether or not the geographical features of the avenue are such as to compel the occupancy of defendant's roadbed. If they are not of that character, no grant by implication can be inferred. The grant to the plaintiff is that it "shall construct its road on Second, from Broadway to Carrollton avenue, thence through the neutral ground of Carrollton avenue to Fourth street, and thence along Fourth to the parish line." There was no legislation declaring any part of the street neutral ground when this ordinance was passed, and the passage of the ordinance subsequently is an evidence that no designation had been given by the city to any part of the street as neutral ground. The only neutral ground to which the ordinance could apply was to the unoccupied part of the street. The ordinance could not, after the grant, by simply designating a part of the street as neutral ground, give any additional powers not conferred by the ordinance. Nor could it thus authorize, by mere implication, the plaintiff to occupy a part of the street, which right had not been

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previously conferred. After the passage of the above ordinance the plaintiff corporation attempted to go on defendant's tracks, and invoked the proceedings in this suit to expropriate the roadbed, crossties, etc., necessary for its occupancy of the defendant's tracks.

The question at issue is, can a street-railway company occupy the track of another, unless by express authority or by necessary implication? In several cases we have decided that, by special grant of legislative authority, one railway company, to reach its destination to its terminal point, may occupy the tracks of an existing company. In the grant to the plaintiff this doctrine was recognized, as authority is given it to cross and occupy certain tracks until it reaches Carrollton avenue. But, as to Carrollton avenue, there is no authority granted to occupy the track of the defendant corporation. Was then this permission given by necessary implication? On this point we are without precedents in our jurisprudence. But as the decrees in the cases of *Canal & C. St. R. Co. v. Crescent City R. Co.*, 41 La. Ann. 564, 40 Am. & Eng. R. Cas. 329; *Canal & C. R. Co. v. Crescent City R. Co.*, 44 La. Ann. 490, 50 Am. & Eng. R. Cas. 374; *Canal & C. R. Co. v. Orleans R. Co.*, 44 La. Ann. 54, 50 Am. & Eng. R. Cas. 369; *New Orleans, C. & L. R. Co. v. City of New Orleans*, 44 La. Ann. 730; *Id.*, 44 La. Ann. 748; *Canal & C. R. Co. v. St. Charles St. R. Co.*, 44 La. Ann. 1071,—were based on the authorities from other states which had preceded us in street-railway facilities, this court ought to look to the authorities in the other states for instruction and for precedents. In *Appeal of Sharon R. Co.*, 122 Pa. St. 533, 9 Am. St. Rep. 133, it was held, to justify the taking by one railroad company, for the same use, under the right of eminent domain, the land acquired by another company, which is necessary for the latter to economically and expeditiously carry on its present and prospective business, that “there must be a necessity so absolute that without it the grant itself would be defeated, and not a necessity created by the company itself for its own convenience, or sake of economy.” In this case no question can arise as to the impairment of the obligation of a contract, except so far, as stated in the case of *Canal & C. R. Co. v. Crescent City R. Co.*, 44 La. Ann. 491, 50 Am. & Eng. R. Cas. 374, that a

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street railway occupying the tracks of another cannot interfere with the company's road, over whose tracks it runs its cars, so as to disturb its schedule time in accordance with its contract with the city, and thus practically evict it from its roadbed. And here we will state that the necessity for express permission by the city council, or an implication from the authority granted, exists, so that the schedule time of the road first occupying the street cannot be interfered with. In granting the authority the city must undoubtedly have the opportunity of so expressing itself as to shield itself from damages. In the collation of the authorities in the case referred to, under the head of "How Legislative Intent must be Expressed," we find it stated, and amply supported by citation of authorities, that an "implication does not arise, except from the language of the legislative act, or from its being shown, by an application of the act to the subject-matter, to be a necessary condition to the beneficial enjoyment and efficient exercise of the powers expressly granted, and then only to the extent of the necessity. 'There can be no implication,' says the supreme court of Pennsylvania in speaking of the right of a railroad company to take by implication a portion of the road of a street railway, 'unless it arises from a necessity so absolute that without it the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control. It must not be a necessity created by the company itself for its own convenience, or for the sake of economy.' Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511." *In re City of Buffalo*, 68 N. Y. 167; *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391; *Worcester & N. R. Co. v. Railroad Com'rs*, *Id.* 561; *Alexandria & F. Ry. Co. v. Alexandria & W. R. Co.*, 75 Va. 780, 40 Am. Rep. 743, and cases cited in note. The several cases referred to herein in our Reports, and the invariable doctrine announced in the other states of the Union, hold that a street-railway company owns the structure laid by it in the highway, and has a superior right to the space covered by its track. *Pierce*, R. R. 252; *Wood*, Ry. Law, p. 681, § 229; *Com. v. Temple*, 14 Gray 69; *Adolph v. Railroad Co.*, 76 N. Y. 530; *State v. Foley*, 31 Iowa 527. And its rails cannot be used by other competing common carriers driving railway carriages, without special legislative authority. *Wood*, Ry. Law, p.

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681; Railroad Co. v. Kerr, 72 N. Y. 330; Camden Horse R. Co. v. Citizens' Coach Co., 31 N. J. Eq. 525; Central City Horse Ry. Co. v. Ft. Clark Horse Ry. Co., 81 Ill. 523. On page 681 Wood, Ry. Law, it is stated that "a franchise cannot be taken under the general law, but must have for its basis legislative authority, or must arise from necessary implication." And on page 703 the same authority says: "In the construction of railways, it necessarily occurs that highways and other railways must be crossed; and, although the power is not expressly given, it is necessarily inferred. But authority to take the bed of either a highway or railway, longitudinally, for any considerable distance, will not be inferred, especially when it is possible to build the road without doing so." As a conclusion from all the authorities, the same author thus expresses what is a permission by implication to interfere with the franchise of an elder grant: "If, however, the two grants cannot stand together, and, upon an application of the grant to the subject matter, it is found that the latter will be defeated unless it is permitted to interfere with the franchises of another corporation, the presumption is raised that such interference was contemplated by the legislature." Page 699.

In the instant case there was no permission granted to plaintiff to use the rails or roadbed of the defendant company. There is nothing in the situation of the locality which both railways are permitted to occupy to justify a permission by implication to use defendant's roadbed and tracks, or to disturb its franchises. The only unoccupied ground which could be designated as neutral was that on either side of defendant's tracks. This neutral ground was accepted by plaintiff as the territory it was to occupy. The subsequent resolution of the council, simply declaring the space occupied by defendant as neutral ground, was an absurdity, as the council could not change the meaning of words, and, as said in plaintiff's brief, make that neutral ground which in fact was not. The testimony in the record shows that the space first allotted to plaintiff's road is sufficient for its purpose, will not interfere with defendant's franchise, and will not interrupt or disturb the use of the street or avenue. There is not an authority anywhere that does not hold that, to constitute grant to occupy the tracks of a railroad company by another competing company by implication, the implication must be such

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that the grant would be defeated without the use of tracks. Here the competing company has a large space to occupy without interfering with defendant's franchises. What is the franchise granted to defendant? It is that it may construct a road through Carrollton avenue, on unoccupied territory. There is not a word said about the use of defendant's roadbed, and the use of defendant's track does not spring from any necessary implication, as there is ample territory assigned to plaintiff to construct its road without interfering with defendant's roadbed. Judgment affirmed.

MILLER and BREAU, JJ. (dissenting).—The plaintiff, with a franchise for a street railway extending through the neutral ground of Carrollton avenue, seeks to compel the defendant, the New Orleans & Carrollton Railroad Company, to permit the use of its tracks, laid, it is alleged, on the roadbed granted to plaintiff; the use to be jointly possessed by the two companies, and on suitable compensation to be paid by plaintiff. The defendant excepted that the petition showed no cause of action, that plaintiff had no right to use defendant's tracks, and that plaintiff's purchase is void for failure of the council to comply with the law in granting the purchase. The exceptions referred to the merits were renewed in the answer, with the additional averment that defendant, in possession of its tracks for years, had expended money in laying them, and plaintiff had no right on the tracks. From the verdict and judgment in defendant's favor, plaintiff appeals.

The plaintiff, operating a street railway in this city, obtained by transfer the right to extend its tracks to the line of Jefferson parish, on designated streets, of which Broadway was one; but before the privilege was exercised the city, by ordinance of September 9, 1892, authorized the purchaser of the franchise to construct the road through the neutral ground of Carrollton avenue, from Second to Fourth streets; thus substituting the avenue, for the distance named, in lieu of Broadway. The city surveyor, under this change, gave the plaintiff lines for the construction of the road on that portion of the avenue adjoining the banquette on the lower side. Thereafter the council, by ordinance, defined the neutral ground to be the central space of 66 feet lying between the strips of 30 feet wide on either side next to the banquettes. Then the surveyor gave the plaintiff lines to run on this neutral

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ground. This brought about the contention now before us, as plaintiff's lines were over the defendant's tracks. The ordinance under which defendant laid its tracks preceded that of plaintiff, and assigned the upper side of the avenue. The upper side might well have been deemed the space of 30 feet next to the upper banquette. No question is raised on that point; plaintiff only claiming the common use of defendant's tracks, laid as they are on the upper side of the neutral ground, designated as the space through which plaintiff's tracks are to pass.

We have given attention to the argument and authorities cited by defendant to support the contention that our law affords no warrant for expropriation proceedings in this case. The right to use the streets for railway purposes cannot be obtained by expropriation, but is derived from the municipal authorities clothed with the power to regulate the use of the public streets. City Charter Acts 1882, No. 20, § 8; Elliott, Roads & S., p. 561; *Brown v. Duplessis*, 14 La. Ann. 842. The plaintiff in this case asserts the right claimed to be conferred by the city ordinances. The taking (or rather the joint use) of defendant's tracks which this suit seeks to enforce is merely incidental to the ordinances under which plaintiff claims. There is, hence, in our opinion, no room for the discussion of the right of expropriation, in the usual sense of that power; the plaintiff's right, if it exists, being derived from the ordinances. The right of the city, after selling to one company a street franchise, of giving to another company the use of the tracks embraced in the first franchise, is, of course, restricted, but, within the appropriate limits, is conferred by the city charter. The provision is that the city shall have the power to require and compel all lines of railway in any one street to use one and the same track; and it announces the policy, in the public interest, that no street shall be unnecessarily obstructed with a number of tracks, when one will suffice. If, then, the ordinances relied on authorize plaintiff to use the defendant's tracks for the short distance of 1,440 feet, thus obviating two lines of tracks on an important thoroughfare of this city, in our view the case presents the mere question of the exercise of police power, and calls for no examination of the scope of the right to expropriate.

The exception of no cause of action raises the question

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whether the ordinances relied on by plaintiff confer the right to use defendant's tracks. It is true, the ordinances do not refer to the tracks, but the plaintiff's contention is that the right to their use is given by necessary implication. The council, in designating the neutral ground of Carrollton avenue as plaintiff's roadbed, supposed that the words used carried an accepted significance, applied to an avenue with a well-defined central strip. There was testimony that the strips of 30 feet next to the banquette, on either side, were deemed neutral ground by the people in the neighborhood. Such significance, we think, to whatever extent it may have existed, was purely local,—not apt to be the sense of the council, or, indeed, of any one employing the words to designate a portion of an avenue. In their usual acceptance, the "neutral ground" of a wide avenue would be deemed to refer to the central space bordered by trees, and not to the strips of 30 feet wide on each side next to the banquette. Without any other light than that afforded by the ordinance itself, it seems to us, it would be a most arbitrary construction to apply "neutral ground" to either strip, and not to this central space. There are other avenues of this city, of which we take notice, like that in Carrollton. It would hardly occur to any one to call the strips or streets on either side of Canal or Esplanade streets "neutral ground." If he used the terms, the reference would naturally be accepted as referring to the large space or middle ground, and on which, it is pertinent to notice, the city railways on those avenues are placed. In some of the earlier railroad ordinances the words "neutral ground" are used; and the center, and not the sides, or streets were understood to be intended, and the roads located accordingly. See Ordinances City Railroad, etc.; Levy Ordinances, pp. 457, 458, 466. As a question of construction required of us in this case, without other aids than the ordinance, we should hold that "neutral ground of Carrollton avenue" referred to the central space of 66 feet. But we are not left to the original ordinance. The council, by its subsequent ordinance, defined "neutral ground" as this central space. If, as must be conceded, the council had the power to give this right of way, there is no conceivable objection to the defining ordinance, if the roadbed was not stated with precision in the first. It is said that the plaintiff at first received lines from the surveyor, assigning the lower strip of the

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avenue for the roadbed, and then began to construct the road. But both the plaintiff and the city abandoned that interpretation of the ordinance. If the plaintiff began wrong, we do not apprehend it was bound to persist in the error. If the ordinance, whether original or as amended, gave to plaintiff the neutral ground for its roadbed, there was no impediment to the plaintiff's availing itself of its right. In our view, under the plaintiff's ordinance, it acquired the right to build its road over the central space of 66 feet of the avenue. That interpretation of the neutral ground would be natural under the original grant, and is exacted by the plain terms of the amended ordinance, to have effect the same as if part of the grant first conferred.

On the 66 feet through which the plaintiff is authorized to lay its tracks is a graveled road 25 feet in width, which is the thoroughfare for vehicles, extending from Carrollton to the rear. The road occupied part of the 66 feet when the ordinance was passed, and for years before. On the lower side of this road is a row of trees, 10 feet in width; next the road is a space of 5 feet (left, we presume, for the safe passage of the defendant's cars; the tracks of its cars occupying 18 feet alongside the 5-foot space); and succeeding the 18 feet, on the upper side, is another row of trees, of 10 feet. The 66 feet is thus already taken up, to the extent of 58 feet. There is no room for the plaintiff's tracks, unless to the exclusion of the graveled road, or over the defendant's tracks. With the power of the city to compel the common use of the tracks, and under the ordinance giving plaintiff part of the space of 66 feet, the city surveyor gave the plaintiff lines over defendant's tracks, as the only method of executing the ordinances. The defendant resists this use of its tracks. If its contention is successful, the plaintiff can have no tracks on the 66 feet, unless it can be maintained that the ordinances take from the public the thoroughfare in use for years, and established at great expense. Can any such purpose be attributed to the ordinances? Or, in other words, is that construction consistent with the tests that guide rational interpretation? The graveled thoroughfare within the 66 feet is not appropriately to be designated as "neutral ground." We cannot suppose that, in passing the ordinances giving the right of way through neutral ground, it was the intention to destroy a public road, —necessary to the public, and in actual use. In view of the

fact that without encroaching on this road there is copious space for both companies, if they use the same tracks, the conclusion that that was the purpose seems the only reasonable interpretation of ordinances of a city vested with the power to compel the common use of tracks by companies having franchises on the same street. We are fortified in our interpretation by the action of the city authorities in exercising the police power of regulating the use of the streets. There is, in our view, no basis on which we can substitute another construction, compelling the laying of four tracks on an important avenue, when two will suffice; and a construction, too, that leads to the unnecessary deprivation of a railway in use by the public. We think the action of the city surveyor was within the scope of the ordinances.

It is claimed that the ordinances of the plaintiff are not legal, because it is supposed they convey street franchises not sold at public auction. Acts 1882, p. 21. The law requires such sale of a street line of railway. In this case the ordinances supply merely the means of connecting lines above and below the avenue, by giving the use of the avenue for the short distance of 1,400 feet. No such connection could be sold, and hence cannot be deemed within the scope of the act of 1882. Impressed as we are with the duty of upholding this act of 1882, and waiving any expressions not called for in this case, we are of opinion that the controversy presents no infringement on the act. When the city requires the use by two companies of the same tracks, there are the resulting obligations that the company holding the first franchise must be indemnified for the damage incident to yielding up its tracks, that the reconstruction for adapting the tracks to the common use be paid by the company holding the last franchise, that the cost of maintenance shall be borne equally, and that the reconstruction shall be made with the least inconvenience to the first company. *Canal & C. R. Co. v. Crescent City R. Co.*, 47 La. Ann. 314. A decree in plaintiff's favor, under the restrictions suggested, is, I think, the proper solution of the controversy. We therefore dissent from the opinion and decree.

NOTES

Use of Tracks of Another Company—*a. Authority of the Legislature.*
—Under its reserved power to alter, amend, or repeal the charter of a street-railway company, the legislature, or, in some cases, the

municipality, may authorize another company to use its tracks. *Metropolitan R. Co. v. Highland St. R. Co.*, 118 Mass. 290; *South Boston R. Co. v. Middlesex R. Co.*, 121 Mass. 485; *New Bedford, etc., St. R. Co. v. Acushnet St. R. Co.*, 143 Mass. 200; *Kinsman St. R. Co. v. Broadway, etc., St. R. Co.*, 36 Ohio St. 239, 5 Am. & Eng. R. Cas. 327; *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen (Mass.) 262; *People v. Barnard*, 110 N. Y. 548; 36 Am. & Eng. R. Cas. 70, rev'g 48 Hun (N. Y.) 57; *Sixth Ave. R. Co. v. Kerr*, 45 Barb. (N. Y.) 138; *Louisville City R. Co. v. Central Pass. R. Co.*, 87 Ky. 223, 36 Am. & Eng. R. Cas. 463; *St. Louis R. Co. v. Southern R. Co.*, 105 Mo. 577, 46 Am. & Eng. R. Cas. 1; *Union Depot R. Co. v. Southern R. Co.*, 105 Mo. 562. See also *Koch v. North Ave. R. Co.*, 75 Md. 222, 50 Am. & Eng. R. Cas. 401; *North Baltimore Pass. R. Co. v. Baltimore* (Md., 1892), 23 Atl. Rep. 470; *Jersey City etc., Horse R. Co. v. Jersey City, etc., R. Co.*, 21 N. J. Eq. 550, rev'g 20 N. J. Eq. 61; *Ogden City R. Co. v. Ogden City*, 7 Utah 207; *Pacific R. Co. v. Wade*, 91 Cal. 449.

A street-railway company duly authorized to construct and operate its lines in the streets of a city, holds the streets for the use of the public, and subject to the right of the legislature, when demanded by the public welfare, to authorize its track to be used by a competing railroad company upon the payment of just compensation. *St. Louis, etc., R. Co. v. Southern R. Co.* (Mo.), 15 S. W. Rep. 1013.

The right of the legislature to permit one road to use the rails of another road, upon proper conditions, is a grant which is not, under the decisions of the courts in regard to street railways in public streets, a violation of any right of property. The holders of such public grants must be considered as holding them for the public use in the public streets, which are all open to the public, and the right to grant a crossing of the road necessarily involves a right to pass over a large portion of such road when the legislature so directs, and upon the payment of such just compensation to the first grantees if the parties do not agree. *Sixth Ave. R. Co. v. Kerr*, 45 Barb. (N. Y.) 138.

The right of a municipality to grant the use of tracks of one street railway to the service of another does not exist in the absence of direct legislative authority. When, however, such power has been duly extended, and has been properly exercised, the company whose track is thus used can make no valid objection. *New Bedford, etc., St. R. Co. v. Acushnet St. R. Co.*, 143 Mass. 200; *Kinsman St. R. Co. v. Broadway, etc., St. R. Co.*, 36 Ohio St. 239, 5 Am. & Eng. R. Cas. 327.

The right of a municipality, under proper legislative authority, and by a proper ordinance in conformity therewith, to permit the tracks of a street railway company, operated by horse power, to be used by another company, operating its cars by electricity, has been upheld; and the fact that it will be necessary to change the tracks so as to adapt them to the use of the electric cars, and that the

business of the original company would be disturbed to a considerable extent, was held to be no bar to this permission, since the change and disturbance were not allowed except upon just compensation to the original company. *North Baltimore Pass. R. Co. v. North Ave. R. Co.*, 75 Md. 233, 50 Am. & Eng. R. Cas. 408.

The City of New Orleans, by virtue of a power delegated by the legislature, has complete control of its own streets and of street railways laid therein, and may grant the use of a railway already constructed to another company. *Canal, etc., St. R. Co. v. Crescent City R. Co.*, 41 La. Ann. 561, 40 Am. & Eng. R. Cas. 329; *Canal, etc., R. Co. v. Orleans R. Co.*, 44 La. Ann. 54, 50 Am. & Eng. R. Cas. 369; *New Orleans, etc., R. Co. v. New Orleans, etc.*, 44 La. Ann. 728, 50 Am. & Eng. R. Cas. 391; *New Orleans, etc., R. Co. v. Crescent City R. Co.*, 12 Fed. Rep. 308.

In *New Bedford, etc., St. R. Co. v. Acushnet St. R. Co.*, 143 Mass. 200, the city granted to Company A the right to use such tracks of Company B as lay within the city limits. It was held that the statute requiring the consent of the town into which B's tracks extended beyond the city limits did not apply.

In *Toledo Consolidated St. R. Co. v. Toledo Electric St. R. Co.*, 6 Ohio Cir. Ct. Rep. 362, it was held that although the city council might authorize one street railway company to run its cars over the tracks of another, it could not take from one company a portion of its track and turn it over absolutely to the exclusion of the original proprietor, especially where the portion sought to be taken constituted the most valuable part of the system. And since a street railway is regarded as being in the nature of a public use, one company may acquire the right to use the tracks of another by the exercise of the right of eminent domain. *Canal, etc., R. Co. v. Orleans R. Co.*, 44 La. Ann. 54, 50 Am. & Eng. R. Cas. 369; *St. Louis R. Co. v. Southern R. Co.*, 105 Mo. 581, 46 Am. & Eng. R. Cas. 1; *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330; *Covington, etc., R. Co. v. Covington, etc., R. Co.*, 19 Am. L. Reg. 765; *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen (Mass.) 262. See also *Central City Horse R. Co. v. Fort Clark Horse R. Co.*, 81 Ill. 523.

In *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 97 Ill. 506, it was said that "to warrant the taking the property of one party for a public use and placing it wholly in the hands of another party for a public use, it is essential that the new use be a different one, and also that the change from the present use to the new use be for the benefit of the public. Whether the new use be different from the present use is a judicial question which courts may decide."

Joint Use of Motive Power, Fixtures, etc.—In the absence of special statutory provisions authorizing such appropriation, it seems that motive power and fixtures, as well as track, may be appropriated in the exercise of the right of eminent domain. *Metropolitan City R. Co. v. Chicago West Div. R. Co.*, 87 Ill. 324. In *Massachusetts* it is provided by a statute that any street railway company using the

cable motive power, which enters upon or uses the track of another, may, with the approval of the board of railroad commissioners, use the motive power of a prior company, and for such use shall pay such compensation as the board of commissioners shall from time to time determine. Mass. Supp. Pub. Stat. 1882-1886, p. 455.

Constitutionality of Ohio Law Permitting Such Use.—The provisions contained in sec. 3440 of Revised Statutes of Ohio prior to the amendment of April 11, 1890 (87 Ohio Laws, 178), are constitutional. Whether those added by that amendment are constitutional, *quære*. But if unconstitutional, they are distinct and separate from those of the original section and do not affect their validity.

b. Compensation.—But in every case compensation must be made to the company whose tracks are used or condemned. Jersey City, etc., Horse R. Co. *v.* Jersey City, etc., R. Co., 21 N. J. Eq. 550; Cambridge R. Co. *v.* Charles River St. R. Co., 139 Mass. 454, 23 Am. & Eng. R. Cas. 62; Second, etc., St. Pass. R. Co. *v.* Green, etc., St. Pass. R. Co., 3 Phila. (Pa.) 430. See the title EMINENT DOMAIN, American and English Enc. of Law, vol. 6.

In Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 293, it was said that compensation must include the wear and tear of the tracks, etc., but not the diminution in the value of the franchise, nor the loss of profits caused by the operation of the cars of a second company. But in another case a contract was entered into between two companies regarding the use of the track, the terms to be readjusted when necessary "upon an equitable consideration." Readjustment was determined on the basis that the second company's right to use the first company's track was derived by its charter from the legislature, and that it was, therefore, liable only to pay for the use and wear of the track. This was held to be error. The first company's compensation should be determined by the consideration of the contract between them, and of the growth of the business, and should not be limited to the amount lost by the wear and tear of the track. Louisville City R. Co. *v.* Central Pass. R. Co., 87 Ky. 223, 36 Am. & Eng. R. Cas. 463. See also Cambridge R. Co. *v.* Charles River R. Co., 139 Mass. 454, 26 Am. & Eng. R. Cas. 62; Metropolitan R. Co. *v.* Quincy R. Co., 12 Allen (Mass.) 262.

Where a railway company is authorized to lay a railroad of like character with another road, and in the same direction, for a part of its route, and, in some respects, in competition with such other road, the using of the track of such other road by such second company for its cars constantly, or at regular intervals for its whole business, is clearly a taking or appropriation of the property of another to its own use, and is not permissible without just compensation. Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358.

It was also held in this case that the ordinance of a city to fix the terms upon which a street railway track might be used by a second company, made on the latter's application to adjudge such terms, was not an awarding, but was the proper exercise of the reserve

power of the city in granting the franchise, and that it might be executed by ordinance without hearing or notice. *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358. See also *Matter of Kerr*, 42 Barb. (N. Y.) 119; *Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co.*, 20 N. J. Eq. 61.

And the amount of this compensation cannot be arbitrarily fixed by the municipality, but the method appointed by the legislature must be pursued. In the absence of special statutory provisions the same proceedings must be had to determine the amount of compensation as where any other private property is condemned or taken. See the title *EMINENT DOMAIN*, Am. & Eng. Enc. of Law, vol. 6, p. 604; *Canal, etc., St. R. Co. v. Crescent City R. Co.*, 41 La. Ann. 561, 40 Am. & Eng. R. Cas. 329; *Canal, etc., R. Co. v. Orleans R. Co.*, 44 La. Ann. 54, 50 Am. & Eng. R. Cas. 369.

A municipality in granting to any company a franchise may reserve the right to authorize other companies to use its tracks, and also the right to fix the compensation; and, in such case, the company by accepting the franchise becomes bound by the stipulation and cannot claim the right to have damages assessed in the usual way. *Kinsman St. R. Co. v. Broadway, etc., St. R. Co.*, 36 Ohio St. 239, 5 Am. & Eng. R. Cas. 227; *Pacific R. Co. v. Wade*, 91 Cal. 449, 50 Am. & Eng. R. Cas. 362.

In *Massachusetts* the compensation to be paid is to be determined by the board of railroad commissioners, and it is within their discretion to establish rules apportioning the expenses, and regulating the mode of estimating compensation. No exception lies to their exercise of this discretion when no question of law arises. *Cambridge R. Co. v. Charles River St. R. Co.*, 139 Mass. 454, 23 Am. & Eng. R. Cas. 62; *Metropolitan R. Co. v. Highland St. R. Co.*, 118 Mass. 290. Formerly the compensation was determined by commissioners appointed by the court. *Metropolitan R. Co. v. Broadway R. Co.*, 99 Mass. 238; *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen (Mass.) 262; *Boston, etc., R. Corp. v. Western R. Corp.*, 14 Gray (Mass.) 253.

In *New York* it is provided by statute that the compensation for the joint use of a limited portion (one thousand feet) of the track of another company shall be determined by commissioners appointed by the court, or by the board of railroad commissioners, when the companies interested shall unite in a request for that board to act. Rev. Stats. (1889), p. 815. Similar provisions will be found in the statutes of other states.

A, a street railroad company, obtained the right to construct and operate its road through certain streets upon certain express terms and conditions, and subject to such conditions as the council might thereafter prescribe. Afterwards, another company, C, was organized, to which was granted the right of way along certain streets, and also upon a portion of the route already occupied by A, and upon its track, upon the payment to A of a reasonable compensation. These companies failing to agree upon the amount to be paid, the council

prescribed a certain sum which was tendered to A, but refused by it. Thereupon, A brought suit against C to enjoin it from using any portion of its track, alleging, among other things, that the compensation tendered was inadequate; all of which C denied. It was held, first, that A did not acquire an exclusive right to use the route upon which its road was constructed; second, that A's property in its track was subject to be taken for a like public use in common upon compensation being first made; third, that while the amount of compensation must usually be determined otherwise, yet the council having stipulated for the right in such a case was entitled to prescribe a reasonable compensation; fourth, that without proof that the compensation so prescribed and tendered was inadequate, A was not entitled to an injunction. *Kinsman St. R. Co. v. Broadway, etc., St. R. Co.*, 36 Ohio St. 239, 5 Am. & Eng. R. Cas. 327.

Where the legislature has reserved the power to alter, amend, and repeal a charter granted to a street railway company, it may lawfully, whenever it is deemed necessary for the better accommodation of the public, authorize another corporation to use the tracks of the first corporation, making compensation to such company for the use and the wear of its tracks, without making any compensation for the diminution of its profits, or of the value of its franchise. *Metropolitan R. Co. v. Highland St. R. Co.*, 118 Mass. 290, citing *Commissioners of Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446, 15 Wall. (U. S.) 500; *Parker v. Metropolitan R. Co.*, 109 Mass. 506.

In *Pacific R. Co. v. Wade*, Judge, 91 Cal. 449, 50 Am. & Eng. R. Cas. 362, under a provision of the California Code (sec. 499), which provided that "two lines of street railway, operated under different management, may be permitted to use the same street, each paying an equal portion for the construction of the track and appurtenances used by such railways jointly; but in no case must two lines of street railways operated under different management occupy and use the same street or track for a distance of more than five blocks consecutively," it was held that a street railway company which received a franchise has a perfect right to the use of so much of the tracks of another company as is provided by the code, and does not, by such use, take the property of the other company, so that the laws in relation to the ascertaining of compensation to be paid upon taking property under the right of eminent domain, should apply. And the court further held that where, as in the case at bar, the property of the first company was in the hands of a receiver, the court may, upon the application of the second company, without the intervention of a jury, ascertain and fix the amount of one half of the cost of constructing so much of the road as is sought to be used jointly, and to permit such use by the second company upon payment of the amount so determined.

The crossing of tracks at grade, where no material injury results therefrom, is justifiable without the allowance of compensation. *New York, etc., R. Co. v. Forty-second St., etc., R. Co.*, 50 Barb. (N. Y.) 309. In making its determination the court says: "This

crossing became necessary in an authorized use of the streets, the same as the crossing by ordinary carts. It is true that at the point of crossing, the rail of the track which is crossed will be subject to some damage by wear and tear; but that is one of the damages which is necessarily incident in laying rails in a street, the concurrent use of which appertains to others. There may be considerable question whether the statute requires any compensation for the mere crossing of a track. If it does not, none can be had; if it does, then the statute does not make the fixing and payment of such compensation a condition precedent to the crossing." See also *Brooklyn Cent., etc., R. Co. v. Brooklyn City R. Co.*, 33 Barb. (N. Y.) 420, and *Omaha Horse R. Co. v. Cable Tramway Co.*, 32 Fed. Rep. 727.

Proceedings to Appropriate the Use of the Track of Another Company.—In those jurisdictions where it is held that the acquisition of the use of the tracks of another company does not involve an exercise of the right of eminent domain, the compensation to be paid the original company in cases where the parties fail to agree is fixed by arbitrators, the common councils of municipalities, by commissioners, or by courts sitting without a jury, or otherwise, as may be provided by statute. In nearly every state, by a general law, or, in its absence, each municipality under provisions relegating to it the control of street railways, the use of the track of one railway company by another is governed by ordinance, or by statutory and, in some cases, by constitutional provisions, the terms of which must be strictly followed in order to secure a valid right or appropriation thereunder.

The police power has been held a sufficient warrant of authority in a municipality to compel one railway company to permit another to use its tracks. *Union Depot R. Co. v. Southern R. Co.*, 105 Mo. 562; *New Orleans City, etc., R. Co. v. New Orleans*, 44 La. Ann. 728, 50 Am. & Eng. R. Cas. 391.

In *Covington R. Co. v. Covington & Cincinnati R. Co.*, (Ky.) 19 Am. Law Reg. 765, the court, although upholding the above doctrine, stated that the right could be "sustained upon another ground equally, if not more satisfactorily," referring directly to the right of eminent domain.

A contrary view has been held in the following cases, in each of which it was determined that the right of one company to use the tracks of another company could not be acquired "except by an exercise of the right of eminent domain." *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 60 Md. 263, 14 Am. & Eng. R. Cas. 79; *St. Louis R. Co. v. Southern R. Co.*, (Mo.) 15 S. W. Rep. 1013; *Kinsman St. R. Co. v. Broadway & Newburgh St. R. Co.*, 36 Ohio St. 239, 5 Am. & Eng. R. Cas. 327; *Louisville City R. Co. v. Central Pass. R. Co.*, 87 Ky. 223, 36 Am. & Eng. R. Cas. 463; *Metropolitan R. Co. v. Broadway R. Co.*, 99 Mass. 238.

In the exercise of the right of eminent domain to acquire the joint use of railroad tracks already laid, it is not necessary that the party seeking the condemnation should take the entire estate; in-

deed, in such cases, it is proper that the condemning parties should take only such a portion of the estate of the original company as is absolutely necessary to accomplish the public purpose in view. Statutes authorizing the appropriation of the joint use of a portion only of tracks already constructed and in use have been held to be constitutional. *Toledo Consolidated St. R. Co. v. Toledo Electric St. R. Co.*, 6 Ohio Cir. Ct. Rep. 362, *affirming* *Toledo St. R. Co. v. Toledo Consolidated St. R. Co.*, 26 Wkly. L. Bul. (Ohio) 172; *Covington St. R. Co. v. Covington, etc., R. Co.*, 1 Ky. L. Rep. 341.

A street railway company to which the council of a municipal corporation has granted a right to occupy a part of the track of another company, in accordance with section 3438 of Revised Statutes, is authorized by section 3440, without the aid of the amendatory provisions of April 11, 1890, to appropriate the track according to the grant when the companies are unable to agree upon the consideration to be paid therefor; and the appropriate proceeding may be prosecuted under chapter 8 of title 2 of part 3 of the Revised Statutes. *Toledo Consolidated R. Co. v. Toledo Electric St. R. Co.*, 50 Ohio St. 603, 1 Am. & Eng. R. Cas. N. S. 230.

c. In Absence of Legislative Authority.—But in the absence of authority acquired by the means just mentioned, one street railway company has no right to use the tracks of another company without its consent, and will be prevented from so doing by injunction. *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen (Mass.) 262; *Louisville City R. Co. v. Central Pass. R. Co.*, 87 Ky. 223, 36 Am. & Eng. R. Cas. 463; *Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co.*, 20 N. J. Eq. 61, 21 N. J. Eq. 550; *Union Pass. R. Co. v. Continental R. Co.*, 11 Phila. (Pa.) 321; *Germantown Pass. R. Co. v. Citizens' Pass. R. Co.*, 48 Leg. Int. (Pa.) 220; *Boston, etc., R. Corp. v. Salem, etc., R. Co.*, 2 Gray (Mass.) 1; *Central City Horse R. Co. v. Port Clark Horse R. Co.*, 81 Ill. 523.

Right to Cross Track of Another Company.—But a company cannot object to the cars of another company crossing its track where the two highways cross. *Brooklyn Cent., etc., R. Co. v. Brooklyn City R. Co.*, 33 Barb. (N. Y.) 420; *New York, etc., R. Co. v. Forty-second St. R. Co.*, 50 Barb. (N. Y.) 309; *Market St. R. Co. v. Central R. Co.*, 51 Cal. 583. An injunction will not lie to restrain a street railway company from laying a second track across the track of another, it appearing that the latter company has no exclusive right to occupy the street, and there is no allegation or proof that the latter company is insolvent or the injury irreparable. *Highland Ave., etc., R. Co. v. Birmingham Union R. Co.*, 93 Ala. 505, 50 Am. & Eng. R. Cas. 422.

Under the *Pennsylvania* statute (Pub. Laws, p. 211, sec. 18), a street railway may cross "at grade diagonally or transversely, any railroad operated by steam or otherwise." An injunction will lie, therefore, to restrain one railroad company from removing and destroying the road of another company laid in conformity to the grade across its road-bed. *Buffalo, etc., R. Co. v. DeBois Traction*

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Pass. R. Co., (Pa., 1892) 24 Atl. Rep. 179; Braddock, etc., R. Co. v. Braddock Electric R. Co., 1 Pa. Dist. Rep. 44.

d. Statute Prohibiting Lease.—A statute prohibiting street railway companies from leasing their rights or franchises to other companies owning and operating parallel roads, does not preclude such companies from making traffic contracts for the partial use of their respective routes beyond the line of parallelism. *People v. O'Brien*, 111 N. Y. 1, 36 Am. & Eng. R. Cas. 78; *Canal, etc., R. Co. v. Orleans R. Co.*, 44 La. Ann. 54, 50 Am. & Eng. R. Cas. 369. See also *Koch v. North Ave. R. Co.*, 75 Md. 222, 50 Am. & Eng. R. Cas. 401.

In *Brooklyn Crosstown R. Co. v. Brooklyn City R. Co.*, 51 Hun (N. Y.) 600, it was held that an agreement between two railroad companies conferring on each a right to use a portion of the other's track, did not bestow such a right or interest as could become the subject of sale or assignment.

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v.

MONTANA CENT. RY. CO.

(*Supreme Court of Montana, May 26, 1896.*)

Foreman and Laborer Fellow Servants.—The foreman or boss of a small gang of about six men, engaged in repairing defendant's railroad, under the orders and control of the foreman, and the plaintiff, a laborer in the gang, are fellow servants of the railroad company, so as to preclude the plaintiff from recovering damages for personal injuries caused by the negligence of the boss.

APPEAL from Silver Bow county district court. *Reversed.*

This was an action brought by plaintiff against the defendant to recover damages from the defendant company, alleged to have been sustained on account of defendant's negligence. Plaintiff was a laborer in the service of the defendant when he was injured. The defendant denied the injury, and denied any negligence, and alleged that at the times mentioned in plaintiff's complaint its tools and appliances were in good order; and that, if plaintiff was injured at all, it was owing to his own neglect and want of care. The case was first tried in a justice of the peace court, and judgment rendered for plaintiff against the defendant for \$298. It was

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appealed to the district court, where the following facts were brought out in evidence: The plaintiff was a laborer in an extra gang of about six men employed by the defendant company. McNulty was foreman of the gang, and hired plaintiff. On December 15, 1893, the men were raising the track called the "guard rail," and plaintiff was putting a block as a fulcrum in under the rail to lift the track with. The rail stuck in the block. When the foreman told the men to raise up the rail, they did so. Several of the men who were in the gang were at the further end of the rail, plaintiff being close down to the track, where the block was to be put in. The plaintiff got hold of the rail with both hands, and lifted it up under the rail in the track, and wanted to shove up the block with his foot to get a good lift. Finding the block would not move, he kicked it off, and then shoved it up tight, and put his hand down to straighten it. The block came up sideways, and while plaintiff was down in that position, and had the block partly straightened, and as he was about to raise up, the men came down on it, and the rail broke. The foreman had hold of the rail, and told the men to come down on it, and they did so. Plaintiff said he had no opportunity to get away after the foreman ordered the men to come down. He jerked his hand and foot as quickly as he could, but the rail fell on his foot, and hurt him, breaking the bones in his toe, and otherwise injuring his foot. The court, among other things, charged the jury as follows: "You are instructed that if you find that the plaintiff was injured through the carelessness of the foreman in giving orders when the plaintiff was in a dangerous position, and that the foreman did not act with ordinary care and prudence, then the plaintiff should recover against the defendant such damages as the evidence shows he has sustained." The following instructions were refused: "The court instructs the jury that the rule of law is that a common employer is not responsible to a servant for an injury caused by the negligence or carelessness of a fellow servant of such servant engaged in the same line of employment; and in this case, if the jury believe from the evidence that at the time of the accident in question the plaintiff was in the employ of the defendant as a laborer engaged in repairing one of the defendant's tracks, and that while so employed, and in the line of his duty, he received an injury resulting from the negligence or carelessness of the foreman or boss superintend-

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ing said work, then the court instructs the jury as a matter of law that the plaintiff and such foreman were fellow servants in the same grade or line of service within the meaning of the law, and the defendant would not be liable for such injury. The court instructs the jury that if they believe from the evidence that plaintiff, together with other persons, were engaged in repairing or working upon the track of the defendant, and in the employ of the defendant, then they were fellow servants engaged in the same common employment. The fact that one of them had the control or command over the others, was the foreman or boss (if such was the fact), would not be sufficient to destroy such relation of fellow servants; and if the injury complained of herein, if any, was caused or brought about by the carelessness or negligence of such foreman or boss, still the defendant would not be liable therefor." The jury found a verdict for plaintiff in the sum of \$200. The defendant moved for a new trial, assigning as error the giving of the instruction, hereinbefore quoted, and the refusal to give the instructions above set forth. The motion for a new trial was overruled. Defendant appeals from the order overruling the motion for a new trial and from the judgment.

H. G. McIntire and A. J. Shores, for appellant.

HUNT, J. (after stating the facts).—This case presents for decision the question whether the foreman or boss of the small extra gang of about six men engaged in repairing the defendant's railroad and the plaintiff, a laborer in the gang, were fellow servants of the railroad company, so as to preclude the plaintiff from recovering damages from the company for personal injuries caused by the negligence of the boss. Since the decision of this court on the rehearing of the case of *Crisswell v. Railroad Co.*, 18 Mont. —, 44 Pac. 525, announcing that the statute of the territory of Montana, which modified the common-law rule of the liability of a master to his employees for injuries to the latter by the negligence of a superior, was repealed by the adoption of the state constitution, the courts are obliged to determine questions such as the one now before us by the general law. The supreme court of the United States regard the question as essentially one of general law. "It does not depend," says Justice BREWER in *Railroad Co. v. Baugh*, 149 U. S. 368, 54 Am. & Eng. R. Cas. 328, "upon any statute. It does not spring from any local

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usage or custom. There is in it no rule of property; but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but, in the absence of such legislation, the question is one determinable only by the general principles of that law." Reference must, therefore, always be had to the principles controlling the relations of the master towards his servant. We should turn, too, to the decisions of learned courts which have applied those principles, and established precedents worthy to be regarded as authorities. But in the consideration of all such adjudged cases it is well to bear in mind that the varying applications of the rules of the law of negligence demand that each decision should be strictly regarded with relation to the exact facts before the court. The distinctions necessarily become highly important. The familiar rule is that a servant entering into service assumes the ordinary risks of the employment entered into, which include the risk of injuries caused through a fellow servant's negligence. The recognition of this rule underlies the Ross Case, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, and the many subsequent decisions of the federal supreme court. The difficulties have been in determining what is properly deemed a common employment. After consideration of the conduct of railroads and their "vast and diversified" business, it has been finally held that the principle that a master is liable to a servant who is injured through the master's failure of duty towards him is reasonably applied where, of practical necessity, there are distinct and separate departments of service in the general conduct of the business, and where persons placed by the master in charge of any such departments or separate branches are given entire or absolute control therein. Such persons, so far as employees under them are concerned, are vice principals and representatives of the master. Such is the doctrine of the Ross Case, *supra*, as interpreted and followed by the supreme court in late decisions. But the application of the rule of the Ross Case has been most cautiously restricted by the supreme court, and their discussions of the meaning of the phrase, "different branches or departments of service," demonstrate the care with which the learned justices now guard the line of sepa-

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ration between a fellow workman and a superintendent of a particular and separate department. "It has ever been affirmed," they say in the Baugh Case, "that the employee assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a co-worker." In *Railroad Co. v. Hambly*, 154 U. S. 349, the court, by Justice BROWN, classify the decisions of the leading state courts upon the fellow-servant doctrine, and thus speak of the classes of cases involving the questions of "subordination" of fellow servants and "different departments": "Of both classes of cases, however, the same observation may be made, viz. that to hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service—as, for instance, between brakemen of the same train, or two seamen of equal rank in the same ship—are comparatively rare. In a large majority of cases there is some distinction, either in respect to grade of service or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent,—as, for example, the superintendent of a factory or railway,—and the employments were so far different that, although paid by the same master, the two servants were brought no further in contact with each other than as if they had been employed by different principals. To these examples where the superior is deemed a principal rather than an agent, may be added the superintendent of a mine, as was decided in *Kelley v. Mining Co.*, 16 Mont. 484.

Adhering to the doctrine that mere superiority of position is no ground of liability, the supreme court has recently been called on to decide the precise question involved in this case. In *Railroad Co. v. Peterson*, 162 U. S. 346, one Holverson was foreman of an extra gang of men employed on a section of the road to keep the same in repair. The duties of the gang were to put new ties in where necessary, and to do work of that general nature. The section gang worked under the

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foreman or boss. Holverson, as foreman, had the power to employ men and to discharge them. The company furnished the tools. Holverson always went with the men, and superintended their work. While the men were returning from work one day upon two hand cars, Holverson, the foreman, negligently applied the brakes on the front car, and abruptly stopped it. He gave no warning of his intention, and the rear car ran into the one ahead, the result of which was that the first car was thrown from the track, and plaintiff was injured. He recovered damages. The court assume that Holverson had exclusive charge of the direction and management of the gang in all matters connected with their employment, and that the plaintiff was subject to the authority of Holverson in all matters relating to his duties as laborer. The circuit court of appeals held (*Northern Pac. R. Co. v. Peterson*, 51 Fed. Rep. 182) that the plaintiff and Holverson were not fellow servants, so as to preclude plaintiff recovering from the railroad company for injuries sustained through the negligence of Holverson, acting as such foreman. But the supreme court say that a foreman of such a gang is not a chief or superintendent of a separate and distinct department or branch of business of the company, as those terms are used where the company is made liable for the negligence of such officers. The *Ross* and *Baugh* Cases are discussed, and the meaning of the expression "departmental control," as applied to facts like those in the case before us, is construed to be correctly laid down in *Railroad Co. v. Hambly*, *supra*, where it was said: "That a common day laborer in the employ of a railroad company, who, while working for the company under the orders and direction of a section boss or foreman on a culvert on the line of the company's road, receives an injury through the neglect of a conductor and an engineer in moving a particular passenger train upon the company's road, is a fellow servant of such engineer and of such conductor in such a sense as exempts the railroad company from liability for the injury so inflicted." The last case cited, and that of *Railroad Co. v. Keegan*, 160 U. S. 250, "exclude," says Mr. Justice PECKHAM "by their facts and reasoning, the case of a section foreman from the position of a superintendent of a separate and distinct department." As directly applicable to the facts of the case before us, we quote as follows: "This boss of a small gang of 10 or 15 men, engaged in making

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repairs upon the road, wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work of the master, as would be necessary to render the master liable to a co-employee for his neglect. He was in fact, as well as in law, a fellow workman. He went with the gang to the place of work in the morning, stayed there with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the hand car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss, and the other subordinate, but both are, nevertheless, fellow workmen." The court disapprove of the view of the circuit court of appeals "that the nature and character of the respective duties performed by and devolved upon persons in the same common employment should in each instance determine whether they are or are not fellow servants, and that such relation should not be deemed to exist between two employees where the function of one is to exercise supervision and control over some work undertaken by the master which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management." The facts of that particular case presented no difficulty by way of embarrassment, in determining the question of the line of separation between a fellow workman and a superintendent of a particular and separate department, for, say the court, the foreman and the laborer in such a case are clearly fellow servants. That case is decisive of this one. Here the neglect for which the plaintiff recovered was the neglect of McNulty, the foreman, in not exercising proper caution by warning the plaintiff and other men to look out before he ordered the men to bear down on the rail before it broke. Under the Baugh decision, the foreman, McNulty, was not "clothed with the control and management of a distinct department," but of a mere separate piece of work in one of the branches of service in a department. It was, therefore, "not a neglect of that

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character which would make the master responsible therefor, because it was not a neglect of a duty which the master owes, as a master, to a servant when he enters his employ." *Peterson v. Railroad Co., supra.* The Peterson Case, just cited, was also approved of in *Railroad Co. v. Charless*, 16 Sup. Ct. 848, where the court refer to the general principles of the law of master and servant set forth in the Peterson Case as controlling the case then under consideration. It follows that the instructions of the court to the jury were erroneous. The court ought to have given the substance of those asked to be given by the defendant. For these errors the judgment must be reversed, and the case remanded, with directions to grant a new trial. *Reversed.*

PEMBERTON, C.J., concurs. DE WITT, J., not sitting.

MIAMI POWDER CO.

v.

PORT ROYAL & W. C. R. CO.

(*Supreme Court of South Carolina, July 23, 1896.*)

Damages to Goods—Payment of Freight Charges.—The payment, or tender of payment, by the consignee of freight charges on goods shipped by a common carrier need not be alleged or proven in an action to recover for damages to goods, if the damages to the goods equal or exceed the value of such charges.

Proof of Condition of Goods.—Evidence tending to show the condition of the goods is relevant at any time before judgment, where an action is brought against a carrier for claim and delivery, and for damages for wrongful detention.

APPEAL from Greenville county common pleas circuit court.
Reversed.

The court stated the following in granting a nonsuit:

“This is a motion for a nonsuit, upon the ground that there is no evidence that the plaintiff had fulfilled the condition precedent to the bringing of an action of this character, namely, that the consignee should first pay the freight charges before he can sue the common carrier for damages done to goods in transitu, and on the additional

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trial court.

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ground that there is no evidence that the powder was injured.

“This second ground I must overrule. While the proof of injury to the powder is meagre and unsatisfactory, still, such as it is, it is a matter for the jury. Williams, the consignee, does testify that, of the 400 kegs of blasting powder in the consignment, a large portion—‘from one third to one half’—were badly damaged. And as to these damaged kegs he says: ‘I don’t think I could have sold them for more than half price.’ He describes the condition of the injured kegs as being very badly indented, and as being wet, and adds that a sharp indentation breaks the japanning on the sheet-iron kegs; that japanning is intended to prevent rust and dampness; that, if dampness gets to the powder, the powder cakes and gets like dust. It is true that he gives no positive testimony that the powder was actually injured, unless it be where he says that ‘strings of powder could be seen from the can to the platform.’ All the rest of his testimony could only amount to a presumption that the powder inside the indented kegs may have been injured. If the case were to go to the jury, I should particularly direct their attention to the nature of his testimony, but I should properly leave it to them to say whether or not it was sufficient to satisfy them that the powder was really injured. That the kegs were wet; that they were very badly indented; that sharp indentation breaks the japanning; that kegs are japanned to prevent rust and keep out dampness; that dampness causes blasting powder to cake and get like dust; that the japanning on many of the kegs was broken; that he could not have sold the indented cans for more than half price,—all this, as proof of injury to the powder, may simply amount to a very far-fetched and shadowy presumption, arising out of very little and unsubstantial proof of fact. But sufficiency of proof is a question solely for the jury. The case will not go to the jury, however. The motion for a nonsuit must be granted on the other ground, namely, that the consignee, the plaintiff’s agent, did not pay the freight charges before bringing his action.

“The plaintiff’s witness Williams testifies that the freight bill for the powder was \$137; and that it was not paid; that the railway agent refused to let him have any of the powder unless he first paid the freight; that he offered to take the uninjured powder and pay the freight, but that the railway agent said, ‘No; you must pay the freight on all before

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you can take it;' that, as the freight was not paid, the consignment of powder was left in the depot; and that he does not know what became of the powder. The case of *Ewart v. Kerr, Rice*, 203, 2 McM. 141, is relied on by plaintiff's counsel in resisting the motion. The old court of appeals, in the year 1839, did lay down the doctrine in that case that if the property of a freighter was damaged while in the care of the common carrier, to an amount greater than or equal to the freight charges, the common carrier's lien for freight was extinguished, and the freighter or consignee not only had the right to demand the property without payment of freight, but, if delivery was refused, such retention amounted to a conversion, for which an action for trover would lie. This was the opinion of a divided court, two of the five justices not concurring, and one of the two (Judge EARLE) filing a very strong dissenting opinion. The case was heard over fifty years ago, in the early days of railroads. But even then the doctrine laid down was not in accord with the decisions of the courts of England and the rest of the United States; nor has it since received support elsewhere. I have been shown no decision of any court outside of this state holding similar doctrine. So far as I am aware, the invariable rule elsewhere is that the freighter or consignee must first pay the freight charges, have the goods delivered to him, ascertain the damage he has suffered, and then bring his action. And that, I must hold, is now the rule in this state, since the decision of our present supreme court in the appeal taken in this case after the former trial. *Miami Powder Co. v. Port Royal & W. C. R. Co.*, 38 S. Car. 78. Mr. Justice POPE, speaking for the court in that case, after recognizing the rule laid down in *Ewart v. Kerr*, says: 'But we feel constrained to observe that the more recent decisions of the court of last resort in this state, notably the cases of *Shaw v. Railroad Co.*, 5 Rich. 462, and *Nettles v. Railroad Co.*, 7 Rich. 190, seem very clearly to point out the course of duty in a consignee whose property is injured while in the control of the common carrier to be to pay all freight charge, and then sue the carrier for the injury done him.' What follows is peculiarly applicable to this case: 'As a practical result, we cannot see how the character and extent of injuries to goods can be correctly ascertained by the consignee while the same are in the hands of the common carrier, and hence this consignee is without

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the proof requisite to establish his claim for such damages.' *Miami Powder Co. v. Port Royal & W. C. R. Co.*, 38 S. Car. 89. It was almost impossible for Williams, the consignee in this case, to adduce any evidence of injury. His testimony consisted almost entirely of presumptions based upon presumptions, and not of facts proved. If he had had the powder kegs in his possession, he would have been able to prove what was the extent of the injury. Following the doctrine announced by Mr. Justice POPE, I am clearly of the opinion that the plaintiff in this case must suffer a nonsuit, because the consignee failed to pay the freight charges before bringing his suit. It seems to me both as matter of law and as common sense, that, before suing for damages, the plaintiff should have paid the freight, obtained possession of the goods, and ascertained the extent of the injury, if any. To hold otherwise would subject the common carrier to all the trouble and inconvenience, so well depicted by the learned associate justice, and end by compelling the common carrier to become a retail merchant in self-defense. The motion is granted."

Mr. Parker, for plaintiff, asked the court if he made any ruling that the damage did not exceed the freight charges, —\$137.

The Court: "No; for Williams stated that he did not think he could have sold the damaged kegs for more than half price. If the whole lot was worth \$860, then a third or a half would exceed the freight bill."

Mr. Parker then asked if the ruling as to the nonsuit applied to both causes of action.

The Court: "Yes, Mr. Parker: from the nature of both causes of action, my ruling necessarily applies to both."

The following are appellant's exceptions:

"Take notice that, in accordance with the notice of appeal heretofore served on you, we shall appeal to the supreme court in this case and move the court to reverse the judgment of the circuit court for the following reasons: (1) Because his honor erred in excluding the testimony of Jas. T. Williams as to the condition of a certain part of the powder, and of the cans containing the same, when the same were exhibited in court by Major Ganahl, one of the counsel for defendant, at a former trial of this cause. (2) Because his honor erred in excluding the testimony of Jas. T. Williams as to the condi-

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tion of the powder, and the cans containing it, when the same were delivered to him for disposition, three years after the institution of this suit, by agreement of counsel. (3) Because his honor erred in granting the nonsuit in this cause so far as such nonsuit affects the first cause of action, it being submitted that there was some testimony, sufficient to be submitted to the jury, to the effect that the goods had been damaged to an extent equal to or greater than the amount of the freight, and that, after demand, the defendant had refused to deliver the goods to the consignee, who was entitled to the possession thereof. (4) Because his honor erred in holding that it was a prerequisite to an action by the consignee against a common carrier for conversion of goods that the consignee had paid the freight due on such goods, even though it appeared that such goods had been damaged in transportation to an amount greater than the amount due for freight. (5) Because his honor erred in not holding that, if goods are damaged in transportation by a common carrier to an amount equal to or greater than the freight due, it amounts to a conversion of said goods, for which the common carrier can be held liable, if it refuses to deliver the goods to the consignee, upon demand therefor. (6) Because his honor erred in ordering a nonsuit as to the second cause of action, it being submitted that there was some testimony sufficient to submit to the jury to the effect that there was damage to the goods in transportation caused by the common carrier."

Haynsworth & Parker, for appellant.

M. F. Ansel and Joseph Ganahl, for respondent.

JONES, J.—This action, commenced in 1889, was first tried in 1891, and resulted in a verdict for the plaintiff for \$860. On appeal this verdict was set aside, and a new trial ordered. *Miami Powder Co. v. Port Royal & W. C. R. Co.*, 38 S. Car. 78. The case then came on to be heard before Judge BENET and a jury, at November term, 1895. The plaintiff was nonsuited, and this appeal is from the order of nonsuit.

The complaint alleges two causes of action. The first cause is for damages, \$860, the full value of 400 kegs of powder, which defendant, as a common carrier, contracted with plaintiff to deliver to a consignee at Greenville, S. C., but was so negligent therein that said powder was wholly lost to plaintiff; also for \$100, damages, additional, for delay and

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having to furnish other goods by reason of defendant's negligence. The second cause of action was for the delivery of 400 kegs of powder, and for \$430, damages for the negligent transportation thereof. It is conceded that \$137 is the amount of the freight charges for the transportation of the goods. Judge BENET, in his remarks granting the nonsuit, concedes that there was some evidence tending to show that the amount of damages exceeded the amount due for freight. The remarks of his honor granting the nonsuit should be incorporated in the report of the case, together with appellant's exceptions.

The principal question in this case is whether a consignee or freightee must first pay the freight charges before he has any right to sue the common carrier for damages to the goods, or for the delivery of the goods, and for damages thereto, when the damages equal or exceed the freight. The order of nonsuit is based on the affirmative of this proposition. We think, upon reason and authority, that the nonsuit cannot be sustained. There is no doubt that under our Code, § 171, in an action by the carrier for the freight, the freightee may set off or counterclaim any loss or damage he may have sustained to his goods by the negligence of the carrier in the transportation or delivery. Under the old English practice, this was not allowed, but the freighter was compelled to resort to a cross action. *Bornmann v. Tooke*, 1 Campb. 377; *Shields v. Davis*, 6 Taunt. 65. But this doctrine has been repudiated in America. It seems that in England now, under a comparative recent statute, such a set-off is allowed on an action for the freight. It is stated in 8 Am. & Eng. Enc. Law, p. 977, that "in the United States it is well settled that, if the goods are damaged in a manner for which the carrier is liable, the owner may deduct the amount of injury from the freight, or he may recoup the amount of damage when sued for freight." In 2 Redf. R. R., p. 188, it is stated in the text: "If the goods be damaged in a manner for which the carrier is liable, the owner may deduct the amount of injury from the freight." And, in a note on the same page, it is said: "The right of the owner of the goods to insist on any damage done to the goods, for which the carrier is liable, by way of recoupment or deduction from the freight, is well established in this country, and is a most elementary principle, as applicable to

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analogous cases." Our case of *Ewart v. Kerr, Rice* (S. Car.) 203, was one of the pioneers on this line, and the court's wisdom is being more and more vindicated. The freighter's right to set off his damages against the freight is the first logical step in the solution of the question. Undoubtedly, the carrier has a lien on the goods for the freight due upon the performance of its contract. In *Ewart v. Kerr, supra*, Judge O'NEALL said: "The lien of the carrier is made exactly equal to his remedy by action." Thirty years later, the Vermont supreme court, in *Dyer v. Railway Co.*, 42 Vt. 441, said: "The carrier's lien is, of course, only co-extensive with his right to claim and recover freight." In the last case above, the supreme court of Vermont said: "It is fundamental in the law that the right of the carrier to have his freight results from the performance, on his part, of the contract in virtue of which he undertakes and proceeds in the carriage of the property. If they fail to carry, and have ready for delivery, they could not maintain a claim for freight. If, in the carriage, they should subject themselves to liability for damage to the consignee in respect to the property carried, that would disentitle them to the extent of such liability, to demand and recover freight. And, if damage should exceed the amount of the freight to which they would otherwise be entitled, of course they would not be entitled to demand and recover anything for the carriage of the property. Such seems to be the result of unquestioned principles, and of the decided cases bearing upon the subject." This case distinctly holds that where the carrier, by delay in transporting and delivering goods, has injured the consignee to an amount equal to the charge for freight, the carrier's lien ceases, and the consignee may maintain replevin for the goods, without paying or tendering the freight. In 8 Am. & Eng. Enc. Law, p. 969, it is laid down that the carrier's lien is co-extensive with its right to recover freight; and, in same volume (page 977), that, if the damage equal the freight, the carrier's lien is gone,—citing our case of *Ewart v. Kerr, supra*, and the Vermont case *supra*, and other cases. *Ewart v. Kerr*, though decided in 1839 by a divided court, was again before the court in 1840, and the doctrine announced in the former decision was reaffirmed. 2 McCul. 143. This case expressly rules that the carrier's lien for freight is only co-extensive with his legal right of action for freight, and may be defeated

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where the damage done to the goods by the fault of the carrier equals or exceeds the freight; that in such case the freighter may maintain trover against the carrier for the goods detained under the supposed lien for freight. This case has never been expressly overruled, but it is argued that this court, in *Miami Powder Co. v. Port Royal & W. C. R. Co.*, 38 S. Car. 78, announced principles in conflict with it. Mr. Justice POPE, delivering the opinion in this case, said, after stating plaintiff's contention: "This court is relieved of an extended consideration of these propositions of law, because this precise point was considered by the court of appeals years ago, in the case of *Ewart v. Kerr, Rice* (S. Car.) 203; 2 McMul. 141; and in that case it was decided by a divided court that if the property of the plaintiff was damaged, while in the care of the common carrier, to a greater extent than the bill of freight, the lien of the latter was extinguished and the consignee not only had the right to demand the property of the carrier without payment of freight charges, but that such retention by the common carrier, after the demand made, amounted to a conversion, and that an action of trover would lie. It must be observed that in order for the principle established in *Ewart v. Kerr, supra*, to apply, the damage to the property, while in the hands of the common carrier, must be equal to or greater than the freight charges. There is no evidence establishing this fact in the case at bar, and the charge of the circuit judge in response to the request to charge of the defendant (appellant) failed to place this essential element before the jury." It is obvious from the above quotation that the court not only did not overrule, but distinctly reaffirmed, the doctrine of *Ewart v. Kerr*. It is true, and, without attempting to explain by hair-splitting distinctions, we frankly confess, that there follow the above quotation expressions that may mislead as to the opinion of the court concerning *Ewart v. Kerr* as authority. These expressions quoted as tending to impeach the doctrine established in *Ewart v. Kerr* must be taken, and were meant to be taken, as words of caution merely, in view of the practical difficulties in the way of establishing the facts necessary to be established in the application of that doctrine. As a general rule, it is wisest and safest for the freighter to pay the freight, and then sue for damages, since the possession of the goods by the consignee would earliest put the goods to their designed

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use, would tend to diminish the injury arising from the detention for that use, and especially would afford the consignee better means of ascertaining the amount of damage already done; but this is a rule of caution, and not a rule of law. The case of *Shaw v. Railroad Co.*, 5 Rich. 462, decides what is the rule of measurement of damages in a case where the goods in the carrier's possession are not injured in quality, but deficient simply in quantity. In this case 10 barrels of molasses were shipped to the consignee in Camden, who received 8 of the barrels, and declined to receive the other 2, because some 30 gallons, worth \$8.40, had leaked out. The court decided under these circumstances that the owner could not abandon the 2 barrels, and recover their entire value; that he could only recover the price at the place of delivery of the goods actually lost. The value of the goods actually lost being only \$8.40, the case was dismissed, for want of jurisdiction, not because the owner refused to receive the goods on tender by the carrier. We have no doubt that, if the damages proven had been an amount within the jurisdiction of the court, recovery would have been allowed for that amount. In the case of *Nettles v. Railroad Co.*, 7 Rich. 190, there is nothing inconsistent with the doctrine of *Ewart v. Kerr*. This case was a suit for \$120, damages for nondelivery within a reasonable time of the two cases of wool hats, the original cost of which was \$90, upon which plaintiff proved he could have realized a profit of \$30. The goods ought to have been delivered in May, whereas they were tendered in September. The jury were told by Judge O'NEALL that the plaintiff ought to have received them on tender in September, and claimed damages which he had sustained for their nondelivery in time. The jury found a verdict for \$100. The appeal court said: "When they [the goods] were tendered to him, he should have accepted them, and thereby the extreme measure of damages would have been reduced by deduction therefrom of the value of the goods according to their condition at the time and place of tender;" and further said: "It would have been more satisfactory if, by accepting the goods, the plaintiff had been enabled to show exactly the deterioration they had sustained." But it is not intimated in either of the cases last mentioned that payment of the freight and receipt of the goods are essential to maintain an action by the owner for damages thereto by fault of the carrier. On

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the contrary, so far as the Nettles Case shows, no freight was tendered by him for the goods, and he refused the goods when tendered apparently without demand for freight; yet the verdict was sustained. If it had been a rule of law for the freighter to first pay the freight and receive the goods before suing for damages, it is impossible that the verdict in this case could have been sustained.

The title to the goods in the hands of the carrier is in the freighter or consignee, and it follows that, for damages to that property by fault of the carrier, the owner may sue the carrier for damages, even though the property be held by the carrier for the payment of freight thereon, when the damages equal or exceed the freight, in which the freight charges may go to cancel or diminish the damages. When the damage equals or exceeds the freight, the carrier's lien for freight is gone, and the owner's right of possession of his property is complete, and he may maintain an action for claim and delivery for the property, and for damages. The carrier thus loses no right. He either holds the goods under his claim for freight, or he is protected by the bond given by the plaintiff for the return of the property in the event he fails in his action; while, on the other hand, nothing would protect the freighter against his loss in the event of insolvency of the carrier if the freighter were compelled first to pay freight before suing for damages. It follows from these conclusions that the circuit judge erred in granting the nonsuit on either or both causes of action.

We think there was error also in refusing to allow evidence as to the condition of the powder some considerable length of time after its arrival in Greenville. The evidence was competent for whatever it was worth on the question of damages sustained at the time the powder was tendered by the carrier upon condition of payment of freight. **Proof of condition of goods** Whether the jury could infer what was the condition of the powder at that time by its condition at a later time would depend upon the facts and circumstances of the case. The sufficiency of the evidence was wholly for the jury. It is clear that it would be competent for the defendant to exhibit to the jury the powder at any time of trial for the purpose of showing that it was not damaged then, from which the jury could infer that, necessarily, it was not damaged at the time of tender. For a like reason, the plaintiff may show the condition of the powder at any time before trial, as a

means, however weak may be the force of the evidence, to show its condition at the time of tender. Besides, if there is evidence tending to show that the powder was damaged at the time of tender to an amount equal to or exceeding the freight, then it becomes relevant in an action for claim and delivery and for damages to show the condition of the powder at any time before judgment, because, if the damage at the time of tender exceeded the freight, the detention of the goods by the carrier was unlawful, and damage resulting from that unlawful detention becomes relevant. It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court for a new trial.

NOTES

Allegation of Consideration for Carriage.—In actions *ex contractu* for loss of goods, it will be sufficient to allege generally that the conveyance of the goods was in consideration of a reward to be paid, without specifying what the reward was. *Dalston v. Jansen*, 1 *Ld. Raym.* 58; *Deming v. Grand Trunk R. Co.*, 48 *N. H.* 455; *Carter v. Graves*, 9 *Yerg. (Tenn.)* 446. See also *Bristol v. Rensselaer, etc., R. Co.*, 9 *Barb. (N. Y.)* 158; *Ferguson v. Cappeau*, 6 *Har. & J. (Md.)* 394; *Moore v. Wilson*, 1 *T. R.* 659.

In assumpsit to recover the value of goods lost in transit, the declaration alleged a promise by defendant to carry safely and deliver the goods "upon freight therefor to be paid him." It was objected that the declaration should have alleged that the freight was paid or tendered to be paid. It was held that, the declaration having presented a case in which no freight was earned, it would not only have been nugatory to aver either a payment or tender, but such an averment would have been inconsistent with the other allegations in the declarations, showing that the defendant was entitled to no freight. *Ferguson v. Cappeau*, 6 *Har. & J. (Md.)* 394.

Variance.—Where a declaration states a delivery of wool to the carrier at its depot, to be transported immediately to a place named, and avers that in consideration thereof, and of a certain reward to the carrier promised, etc.,—*held*, that on receiving the wool under an arrangement previously made, a duty arose to transport it accordingly, for which the law will imply a promise to do so, and consequently there was no variance in the proof of the consideration. *Deming v. Grand Trunk R. Co.*, 48 *N. H.* 455.

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LOUISVILLE & N. R. CO.

v.

JACKSON.

(Court of Appeals of Kentucky, June 10, 1896.)

Carrying Passengers beyond Destination—Damages.—A railroad company is liable to a passenger for the act of a conductor in carrying him beyond his station for such damages as proximately result from such act.

Instructions—Prejudicial Error.—It is prejudicial error to give an instruction authorizing the jury to award punitive damages if the employee of a railroad company used rude and insulting words to a passenger on the train, when there is no evidence that such words were used.

APPEAL from Bullett county circuit court. *Reversed.*

Fairleigh & Strauss, for appellant.

J. F. Combs and *J. W. Croan*, for appellee.

PAYNTER, J.—Appellee purchased a ticket at Shepherdsville, which entitled her to ride from that point to the “Gap-in-Knob,” on a regular passenger train of appellant. She boarded the train, and, before reaching the Gap-in-Knob, the conductor on the train took up her ticket. While he was looking after a drunken passenger, the train passed the station without stopping, thus carrying appellee beyond her destination. The conductor refused to carry her back to the station, because it would have been in violation of the rules of the railroad company. Huber was the next station on the road. The conductor testified that he proposed to carry appellee to South Louisville, and put her on a train which would within less than an hour carry her to the Gap-in-Knob. The brakeman testifies to the same effect. The appellee denies that such offer was made, and says that the conductor refused to carry her back to the station, but told her she would have to get off at Huber; that he took her by the arm, and went to the steps with her, and, when the train stopped, stood on the steps, and assisted

Case stated.

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her to alight from the train; that she was carried two or three hundred yards beyond the station; put off on some rocks that were broken up; that the conductor said, after helping her off the train, if he had any conveyance, he would have her conveyed back. What occurred after she got off the train is not material for the purpose of the present inquiry, as to the correctness of the instructions which the court gave the jury.

Carrying passenger beyond destination—Damages. It was admitted in the pleadings and on the trial that appellee was carried beyond the station where she was entitled to leave the train. The company was liable to the appellee for the act of the conductor in carrying her beyond her station, for such damages which proximately resulted from such act.

Instructions—Prejudicial error. The facts did not warrant the court in giving an instruction authorizing the jury to award punitive damages. There is no testimony conducing to prove that the conductor, in assisting the appellee from the train, was insulting, either in words, tone, or manner. That he was such cannot be fairly deduced from the testimony of appellee. It is perfectly manifest that he took her by the arm to assist, not to force, her off the train. According to her testimony, the conductor stood on the steps to assist her off the train, but expressed regret that he did not have a conveyance to carry her back. The regret the conductor expressed that he did not have a conveyance shows that neither his words, tone, nor manner were insulting. The court told the jury that they were authorized to award punitive damages if appellant's agents, etc., in putting appellee off the train, were "rude and insulting in words, tone, or manner." There was no evidence upon which to base such an instruction. Had it been proper to submit the question of punitive damages to the jury, the instructions given were erroneous. The court told the jury, in instruction No. 2, that they were the judges of the degrees of negligence, etc., and that, if the defendant was guilty of "ordinary" negligence, the damages were compensatory. In No. 3, the court told the jury that if the defendant was guilty of "willful" neglect, etc., or if the defendant's agents, etc., were "rude and insulting in words, tone, or manner," they were authorized to award punitive damages. The word "willful" has no proper place in instructions in a case like this. If it had, then there was no instruction defining these degrees of negli-

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gence; on the contrary, the jury were told that they were the judges of the degrees of negligence. There being no instruction defining degrees of negligence, the jury were made the judges of the law in this respect, as well as of fact. The instructions were substantially correct except in the particulars mentioned. The verdict was for \$800, and the jury could not have awarded this sum as purely compensatory for the injury complained of. The judgment is reversed, with directions to grant appellant a new trial, and that further proceedings conform to this opinion.

BLOMQUIST

v.

GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, June 8, 1896.)

Negligence of Fellow Servants—Dangers Attendant on Railroad Business.—Plaintiff, with others, was employed as a sectionman in repairing defendant's main track, by taking up rails, putting in new ties, and then replacing the rails. The work had to be done with great and extraordinary haste, in order to avoid danger to trains that were, or might be, approaching. While engaged in performing this work with this degree of haste and while he and another sectionman were carrying a heavy iron rail, plaintiff was injured by his fellow servant's negligently releasing his hold on the rail and letting it fall. *Held*, that plaintiff's employment involved an element of hazard or danger which contributed to the injury, and which was peculiar to the "railroad business," and that, therefore, Gen. St. 1894, § 2701, making railway companies liable to their servants for the negligence of their fellow servants, applied.

APPEAL from Hennepin county district court. *Reversed.**O. Mossness and A. A. Anderson*, for appellant.*W. E. Dodge*, for respondent.

MITCHELL, J.—This action was brought to recover damages for personal injuries suffered by the plaintiff, while in the employment of the defendant, through the alleged negligence of a fellow servant. The question presented by the demurrer to the complaint was whether the facts alleged brought the case within the operation of Gen. Laws 1887,

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c. 13 (Gen. St. 1894, § 2701), making railway companies liable to their servants for damages caused by the negligence of a fellow-servant. The allegations of the complaint were that plaintiff was employed by the defendant as one of a crew of section hands, who were engaged in repairing defendant's track; that while he with the rest of the crew were engaged in the performance of their duties, it became necessary for them to take up from the main track a heavy iron rail, in order to remove the old ties and replace them with new ones, and for that purpose it became necessary to lift and carry the rail, in taking it from the track and afterwards replacing it, and in so doing it was necessary to use great and extraordinary haste, so as to accomplish the work of replacing the rail before the approach of a coming train; that while the rail was being thus moved and carried by the plaintiff and another section man, who were ordered by the section foreman to make haste, so that the track might be put in order so as to avert danger to a then approaching train, plaintiff's fellow-servant, who was engaged with him in carrying the rail, negligently and suddenly released his hold of the rail, and dropped the same, by reason whereof plaintiff suffered the injuries complained of. The language of the act is broad enough to include any injury sustained by any railroad employee, in any capacity, through the negligence of any other employee of the railroad in the same or any other capacity. In order to sustain the law, we have, by judicial construction, limited its operation to those employees of railroads who are exposed to the peculiar dangers attending the operation of railroads, or what are, for brevity, called "railroad dangers." But, as the general language of the act has been thus limited for the sole purpose of sustaining its validity, we think it ought not to be limited further than is necessary for that purpose. We have held that the test is not whether the conditions are in some respects parallel to those to be found in some other kinds of business, or whether the appliances are, in some respects, similar to those used in some other kinds of business, but that if there is any substantial element of hazard or condition of danger which contributed to the injury, and which is peculiar to the railroad business, the statute applies. *Nichols v. Railway Co.*, 60 Minn. 319; *Leier v. Transfer Co.* (Minn.), 65 N. W. 269. "Border cases" will occasionally arise where it will be difficult to de-

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termine whether they fall within the statute or not, and this may be one of them. But we think that under the allegations of the complaint it can be fairly said that plaintiff's employment involved an element of hazard or condition of danger peculiar to the railroad business, and intimately connected with and growing out of the operation of the road, to wit, that he was engaged in repairing the track upon which trains were operated, and that, in view of that fact, the work had to be done with great and unusual haste, in order to avoid danger to trains that were or might be approaching. We therefore think that the complaint stated a cause of action, and that the demurrer ought to have been overruled. Defendant's counsel have not favored us with any brief, and for that reason the order appealed from might have been reversed under the rules; but, under the circumstances, we think that plaintiff is entitled to the benefit of a decision on the merits. Order reversed.

TEXAS & P. R. CO.

v.

JOHNSON.

(Supreme Court of Tennessee, May 18, 1896.)

Liability of Master for Incompetency of Servant.—Where an employer, knowing of the incompetency of an employee, retains him in his service, such employer is liable to a fellow servant of the employee for injuries received by reason of the employee's incompetency.

Knowledge of Incompetency.—The fact that an employee has a general reputation for incompetency among his fellow servants is sufficient to charge the employer with knowledge thereof.

General Reputation of Employee for Incompetency not Sufficient to charge Fellow Servant with Knowledge.—Where an employee has a general reputation for incompetency, such reputation alone is not sufficient to charge a fellow servant with knowledge of the incompetency of the employee.

Instructions.—In an action by the employee of a railroad company to recover for injuries received by reason of the incompetency of a fellow servant, it appeared that the first section of a train in charge of the plaintiff was run into by the second section in charge of a conductor, of whose incompetency the defendant company had knowledge, but which was unknown to the plaintiff. *Held*, that it was not error preju-

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dicial to the defendant to instruct that even though the plaintiff knew of the incompetency of his fellow servant he could recover, if he did not know that the incompetent fellow servant was in charge of the second section of the train.

CERTIFICATE of dissent from court of civil appeals, second supreme judicial district.

Stedman & Thompson, for appellant.

F. E. Albright, A. J. Booty, Wynne & McCart, and *Hogg & Robertson*, for appellee.

BROWN, J.—Joe Johnson was in the employ of appellant as conductor on a freight train, and at the time of his injury was engaged in the discharge of his duty as conductor on a freight train going west from Ft. Worth. The Case stated. injury occurred on the 2d day of June, 1891. The train on which Johnson was acting as conductor stopped at a water tank for the purpose of taking water, and stayed there the usual and necessary time. When about to leave the tank, the train on which Johnson was, was run into from the rear by another freight train, which was known as the second section of the first train. The second section was in charge of one C. S. Roberts as conductor. We copy the following from the conclusions of fact as found by the court of civil appeals:

“(3) That the regular conductor of section No. 2 of train 17 was one Conrad, but for some reason he did not go out on his train that night, as was expected, but one Roberts was put in charge of the train as conductor, and plaintiff did not know that Roberts was put in charge of the second section, which was to follow him, that night, and could not have known thereof by the use of ordinary diligence, as he left Ft. Worth with his train some time before Roberts was put in charge of section 2 of the train. (4) That Roberts was in the employment of defendant as a brakeman, but had been, in May, 1890, appointed also to the position of ‘extra conductor.’ An extra conductor, as proven by the defendant’s officers, is a man that runs other conductors’ trains, when they are laying off, sick, or something of that kind, or might be called upon to act upon any train in the absence of the regular conductor. An extra conductor has no regular caboose crew. The plaintiff, at and before the accident, knew that Roberts had been appointed extra conductor, and was liable to be put in charge of trains at any time. (5) The plaintiff testified that he did

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not know, and had not been informed, prior to the time of the injury, that Roberts was a reckless, incompetent conductor; but the evidence showed that such was Roberts' general reputation among the employees of appellant on the division of the road where plaintiff and Roberts were both engaged, upon the testimony of which employees plaintiff mainly relied to show this general reputation, and that plaintiff and Roberts were personally acquainted. Whether he had such knowledge, then, was a controverted issue in the case."

"(7) Plaintiff's injury was caused by the negligence and recklessness of Roberts, conductor on the second section of the train, in failing to have his train under control, as required by defendant's rules, when he ran into the water station."

"(9) We find that, at the time Roberts was placed in charge of the second section of train 17, the division superintendent of defendant, who had control over the appointment and discharge of conductors and trainmen on that division of defendant's road, knew that Roberts was a reckless conductor, and had known it for at least a month, and had, only a month or two previous thereto, investigated charges against him for recklessly running into the caboose of a train at Coal Mine Station, and found him guilty, and suspended him from service for 15 days; but we also find that, at the time he was appointed as extra conductor, in May, 1890, neither the defendant nor its officers knew of his incompetency or recklessness as a conductor, and that, at that time, he had made no reputation as a conductor, either good or bad."

The majority of the court of civil appeals held that the judgment of the district court should be reversed, and the cause remanded, stating their reasons for such conclusion in the following language: "The court, in effect, charged that, if the defendant, with knowledge of Roberts' incompetency, retained him in its service, and the injury inflicted upon the plaintiff was brought about by that incompetency, the company would be liable, even though the plaintiff knew of such incompetency, provided he did not further know, or by the use of ordinary diligence was unable to ascertain, that the incompetent conductor was in charge of the train following that under the control of the plaintiff. The majority of this court are of opinion that the concluding proposition of this instruction is erroneous, that it vitiates the charge, and requires a reversal of the judgment, as in all probability it seri-

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ously affected the verdict of the jury." Justice HUNTER, of the said court, dissented from the opinion of the majority, which dissent has been certified to this court.

The points of law involved in the certificate of dissent arise upon the latter part of the charge as quoted above, and for convenience we will state the questions as follows: (1) Was there any evidence before the jury in this case which would have authorized them to find that, before the accident, Johnson knew of the recklessness and incompetency of Roberts as a conductor? If not, was there error in the charge of the court, if it be error, such as to justify a reversal of the judgment of the district court? (2) If Johnson knew that C. F. Roberts was employed by appellant as brakeman, and also as extra conductor, and knew that Roberts was reckless and incompetent as a conductor, but did not know that he (Roberts) was to go on the road as conductor that night, did Johnson assume the risk of injury which might occur from the incompetency of Roberts, as conductor, in case he should be put in charge of the train which was to follow Johnson's train?

There is no question that Roberts, the fellow servant from whose negligence the injury occurred, was incompetent and unsafe as a conductor, and that the railroad company knew the fact when it sent him on this trip; and it must be held liable to Johnson for the injury received by him, in the discharge of the duties of his employment, by reason of the negligence of Roberts, while performing his duties as an employee of the railroad company, unless it has been proved that Johnson knew of the unfitness and reckless character of Roberts before the accident. *Railway Co. v. Musette*, 86 Tex. 720; *Railway Co. v. Farmer*, 73 Tex. 88; *Beach, Cont. Neg.*, §§ 127, 128. Mr. Beach, in his work referred to, in section 127, uses this language: "The responsibility of a master to each of his servants for the competency and fitness of the other servants he employs to work with him is in every way analogous to the duty he owes them in regard to the machinery and all the other instrumentalities he furnishes for the performance of the work." The servant is not required to investigate as to the condition of the machinery furnished him, nor is he required to examine into the character of the servants employed to work with him; but he may, and generally must, act upon the assumption that the master has performed his duty in select-

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ing and retaining such servants. McKinney, Fel. Serv., § 95; Rolling Stock Co. v. Wilder, 116 Ill. 100; Railway Co. v. Myers, 55 Tex. 114. In Railway Co. v. McNamara, 59 Tex. 258, in which the injury was caused by defect of the track, the injured party being a brakeman upon the train, the court said: "The master is chargeable with knowledge which he might have acquired by the exercise of due care, the same as if he actually possessed it; whereas, the servant has the right to assume that all necessary examinations have been made by the master, and is not required, either in person or by another employed by him for the purpose, to examine the machinery as to fitness and sufficiency." In another part of the same opinion, after speaking of the duty of the master to keep the track in good order, and the diligence required of the employee, the court said: "The law requires no such extraordinary vigilance and care of servants, nor charges them with knowledge of facts which they could have learned only by their exercise."

It is claimed that Johnson had equal opportunity with the railroad company to know the character of Roberts, and for that reason he cannot recover. This claim is based upon the testimony of Roberts' general reputation among the employees of the defendant engaged in service with him. In order to charge the railroad company with notice of Roberts' unfitness for his work, by proving that it might have known of such fact if it had used ordinary care, the plaintiff proved that the general reputation of Roberts among his fellow servants was that of a reckless, careless, and dangerous conductor. This evidence was admissible against the defendant, for the reason that it was under obligation to inquire into the character of its servant Roberts, and its failure to learn of his general reputation among its employees was of itself negligence. Mr. McKinney, in his work on Fellow Servants (section 90), says: "Evidence of general reputation is admissible to prove the unfitness of a fellow servant; and ignorance of such general reputation on the part of the master is itself negligence, in a case in which proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative." It was not necessary for Johnson to prove that he did not know of the incompetency of Roberts. The burden rested upon the defendant to make that proof. Yet, if the evidence introduced by Johnson of

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Roberts' general reputation was such as would have authorized the jury to find that plaintiff knew of Roberts' recklessness and unfitness, it would have the same effect as if introduced by the defendant, and no more. In other words, it was incumbent upon the defendant, in that case, to show Johnson's knowledge of Roberts' character, unless it appeared from the testimony offered by Johnson himself. The difference in the effect of general reputation upon the rights and duties of the railroad company and Johnson lies in this: that, it being

the duty of the former to inform itself of the character of its servants, the proof of general bad reputation fixed the liability of the company, without proving knowledge of the reputation or of the character of the servant; but, as to the servant Johnson, the proof was simply a means by which it might be shown that he knew of the character of Roberts as a conductor. The general reputation might be proved, in order to show this knowledge; but it must go further, and either show that he knew of that reputation, or place him in such relation thereto, by his surroundings, that a jury could conclude that he did know of the fact. For example, if the proof had shown that the reputation of Roberts had been discussed, in the presence of Johnson, under such circumstances as that a man with ordinary sense of hearing must have heard the conversation, then the jury might conclude that he did hear it, and that he knew of such reputation; but this would simply be a matter of proof, upon the issue of knowledge of the character of Roberts. In order to entitle the defendant to have the judgment reversed in this case, the testimony must be such that the jury could, in the proper exercise of their functions, have found that Johnson knew of the recklessness of Roberts; and, if it falls short of this measure of certainty, then it is insufficient to authorize the court to reverse on account of the charge in question. It would be absurd to say that Johnson might prove the general reputation of Roberts as a conductor in order to fix liability on the part of the railroad company, but that, having made this proof, he is chargeable with notice of that general reputation to the same extent as the defendant, and therefore could not recover. This would make the evidence of his right to recover destructive of the very cause of action that it was

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introduced to sustain. The facts showed that Johnson did not know of the reputation of Roberts, nor of his reckless character; and the proof which was introduced, as shown by the conclusions of fact found by the court of civil appeals, was not sufficient to justify the jury in finding that Johnson had such knowledge.

We answer the first question, that there was no evidence which authorized the court to submit a charge to the jury upon the hypothesis that Johnson knew of Roberts' reckless character as a conductor. It did not Instructions. matter whether Johnson knew that Roberts would follow him on the train that night or not; for, if he knew that Roberts was to act as conductor upon the second section of that train, it not appearing from the evidence that Johnson knew of Roberts' reckless character, no other verdict could have been rendered, under the evidence, than that which was rendered by the jury. If, therefore, it be conceded that the court erred in that part of the charge which informed the jury that Johnson could recover, if he did not know that Roberts was to follow him on that night, it was an immaterial error, and did not justify a reversal of the judgment of the district court. Our conclusion upon this question renders it unnecessary to consider the second question, for the reason stated, that the matter embraced therein becomes immaterial by the decision of the question herein considered. We therefore make no answer to the second question embraced in the certificate of dissent.

NOTES

Incompetency of Fellow Servants.—1. *General Rule.*—An employer who knowingly employs and retains an incompetent servant is liable for injuries to a fellow-servant sustained through the incompetency of the servant so employed and retained, when it appears that the injured servant did not know, and had not the means of knowing, of the incompetency of his fellow-servant. This proposition, it will be seen, is but the converse of the universally accepted rule that where an employer uses due care and diligence in selecting and retaining only competent and trustworthy servants, he is not answerable to one of them for injuries resulting from the negligence of a fellow-servant in the same service.

United States.—Dillon *v.* Union Pac. R. Co., 3 Dill. (U. S.) 319; Wabash, etc., R. Co. *v.* McDaniels, 107 U. S. 454, 11 Am. & Eng. R. Cas. 158; Crew *v.* St. Louis, etc., R. Co., 20 Fed. Rep. 87.

Alabama.—Alabama, etc., R. Co. *v.* Waller, 48 Ala. 459; Mobile, etc., R. Co. *v.* Smith, 59 Ala. 245.

Arkansas.—Little Rock, etc., R. Co. *v.* Duffey, 35 Ark. 602, 4 Am. & Eng. R. Cas. 637.

California.—Hogan *v.* Central Pac. R. Co., 49 Cal. 128; Congrave *v.* Southern Pac. R. Co., 88 Cal. 360, 48 Am. & Eng. R. Cas. 337.

Illinois.—Chicago, etc., R. Co. *v.* Swett, 45 Ill. 197; Illinois Cent. R. Co. *v.* Jewell, 46 Ill. 99; Chicago, etc., R. Co. *v.* Sullivan, 63 Ill. 293.

Indiana.—Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26; Chicago, etc., R. Co. *v.* Harney, 28 Ind. 28; Ohio, etc., R. Co. *v.* Hammersley, 28 Ind. 371; Ohio & M. R. Co. *v.* Collarn, 73 Ind. 261, 5 Am. & Eng. R. Cas. 554; Indiana Mfg. Co. *v.* Millican, 87 Ind. 87; Indianapolis, etc., R. Co. *v.* Johnson, 102 Ind. 352; Evansville, etc., R. Co. *v.* Guyton, 115 Ind. 450, 33 Am. & Eng. R. Cas. 311.

Kansas.—Dow *v.* Kansas Pac. R. Co., 8 Kan. 642; Kansas Pac. R. Co. *v.* Salmon, 14 Kan. 512; Union Pac. R. Co. *v.* Young, 19 Kan. 488.

Kentucky.—Chesapeake, etc., R. Co. *v.* McMannon (Ky.), 8 S. W. Rep. 18, 33 Am. & Eng. R. Cas. 308.

Maine.—Blake *v.* Maine Cent. R. Co., 70 Me. 60, reviewed in Indiana Car Co. *v.* Parker, 100 Ind. 181.

Massachusetts.—Farwell *v.* Boston, etc., R. Co., 4 Met. (Mass.) 49; Cayzer *v.* Taylor, 10 Gray (Mass.) 274; Colton *v.* Richards, 123 Mass. 484; Curran *v.* Merchants' Mfg. Co. 130 Mass. 374.

Michigan.—Marquette, etc., R. Co. *v.* Taft, 28 Mich. 289, 12 Am. Ry. Rep. 279; Slater *v.* Chapman, 67 Mich. 523; Hilts *v.* Chicago, etc., R. Co., 55 Mich. 437, 17 Am. & Eng. R. Cas. 628; Peterson *v.* Chicago, etc., R. Co., 67 Mich. 102, 31 Am. & Eng. R. Cas. 292; Lee *v.* Michigan Cent. R. Co., 87 Mich. 574, 48 Am. & Eng. R. Cas. 356.

Minnesota.—McMahon *v.* Davidson, 12 Minn. 357.

Mississippi.—New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

Missouri.—Rowland *v.* Missouri Pac. R. Co., 20 Mo. App. 463; McDermott *v.* Pacific R. Co., 30 Mo. 115; Rohbach *v.* Pacific R. Co., 43 Mo. 187; Harper *v.* Indianapolis, etc., R. Co., 47 Mo. 567; Moss *v.* Pacific R. Co., 49 Mo. 167; McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285, 28 Am. & Eng. R. Cas. 528.

New York.—Keegan *v.* Western R. Corp., 8 N. Y. 175; Warner *v.* Erie R. Co., 39 N. Y. 468, rev'g 49 Barb. (N. Y.) 558; Laning *v.* New York Cent. R. Co., 49 N. Y. 521; Coppins *v.* New York Cent., etc., R. Co., 122 N. Y. 557, 44 Am. & Eng. R. Cas. 618, aff'g 48 Hun (N. Y.) 292, 17 N. Y. St. Rep. 916; applied in Sutton *v.* New York, etc., R. Co., 50 N. Y. St. Rep. 514.

North Carolina.—Hardy *v.* Carolina Cent. R. Co., 76 N. Car. 5, 14 Am. Rv. Rep. 309.

Pennsylvania.—Weger *v.* Pennsylvania R. Co., 55 Pa. St. 460; Ross *v.* Walker, 139 Pa. St. 42.

Texas.—Houston, etc., R. Co. *v.* Willie, 53 Tex. 318, 5 Am. & Eng. R. Cas. 541; Texas, etc., R. Co. *v.* Whitmore, 58 Tex. 276,

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11 Am. & Eng. R. Cas. 195; Galveston, etc., R. Co. v. Faber, 63 Tex. 344; Gulf, etc., R. Co. v. Ryan, 69 Tex. 665; Galveston, etc., R. Co. v. Farmer, 73 Tex. 85, 38 Am. & Eng. R. Cas. 85, quoting Wall v. Texas, etc., R. Co., 2 Tex. Unrep. Cas. 432; followed in Fort Worth, etc., R. Co. v. Wilson, 3 Tex. Civ. App. 583.

Vermont.—Noyes v. Smith, 28 Vt. 59, followed in Hard v. Vermont, etc., R. Co., 32 Vt. 473; quoted in Columbus, etc., R. Co. v. Troesch, 68 Ill. 545.

England.—Hutchinson v. York, etc., R. Co., 5 Exch. 343, 19 L. J. Exch. 296, 6 Railw. Cas. 680; Wigmore v. Jay, 5 Exch. 354, 14 Jur. 837, 19 L. J. Exch. 300.

2. *General Reputation for Incompetency Enough to Charge Master with Knowledge.*—Evidence of general reputation is admissible to prove the unfitness of a fellow servant, and ignorance of such general reputation on the part of the master is itself negligence in a case in which proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative. Edwards v. R. Co., 4 Cl. & F. 530; Tarrant v. Webb, 18 C. B. 797, 36 E. C. L. 797; Hayden v. Smithville Mfg. Co., 29 Conn. 557; Lake Shore, etc., R. Co. v. Stupak, 123 Ind. 210, 41 Am. & Eng. R. Cas. 282; Gilman v. Eastern R. Co., 13 Allen (Mass.) 433; Summersell v. Fish, 117 Mass. 312; Hatt v. Nay, 144 Mass. 186; Davies v. Detroit, etc., R. Co., 20 Mich. 105; Grube v. Missouri Pac. R. Co., 98 Mo. 330; Mad River, etc., R. Co. v. Barber, 5 Ohio St. 541.

BURNETT

v.

PENNSYLVANIA R. CO.

(*Supreme Court of Pennsylvania, May 28, 1896.*)

Contract of Carriage Governed by Law of Place of Performance.—A pass was issued in New Jersey by a railroad of Pennsylvania from a town in Pennsylvania to a town in New York, with the provision that the railroad company should not be held liable for any accident to the holder. The negligence of an employee of the railroad company caused the plaintiff to suffer injuries while in Pennsylvania. *Held*, that the contract of carriage was governed by the Pennsylvania laws.

APPEAL from Philadelphia county court of common pleas.
Affirmed.

David W. Sellers, for appellant.

A. S. L. Shields, for appellee.

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FELL, J.—The refusal of the court to charge that, “as the contract for transportation was made in New Jersey, it will be enforced in this state as in that, and, as the defendant was released from responsibility by the free pass, the verdict must be for the defendant,” raises the only question to be considered. The plaintiff was employed by the defendant as a flagman at Trenton, N. J. He applied for and was granted free transportation for himself, his wife, and daughter to Elmira, N. Y. He received two passes,—one, from Trenton to Philadelphia, the terms of which do not appear in evidence; the other, an employee’s trip pass from Philadelphia to Elmira, by the terms of which he assumed all risks of accident. He was injured at Harrisburg, Pa., through the admitted negligence of the defendant’s employees. It was proved, at the trial, that, under the laws of New Jersey, the contract, by which the plaintiff, in consideration of free transportation, assumed the risk of accident, was valid, and that, in that state, he could not recover; and it is conceded that, in Pennsylvania, the decisions are otherwise, and that such a contract will not relieve a common carrier from responsibility for negligence. *Goldey v. Railroad Co.*, 30 Pa. St. 242; *Railroad Co. v. Henderson*, 51 Pa. St. 315; *Railroad Co. v. Butler*, 57 Pa. St. 335; *Railroad Co. v. O’Hara*, 3 Penny 199. The question then is, by the laws of which state is the responsibility of the defendant to be determined?

The defendant is a corporation of the state of Pennsylvania. The injury occurred in the operation of its road in this state.

The passes, although issued and delivered in New Jersey, were for transportation from the station in Trenton directly across the Delaware river into this state. The service was to be rendered here.

This was the place of performance. Generally, as to its formalities, and its interpretation, obligation, and effect, a contract is governed by the laws of the place where it is made, and if it is valid there it is valid everywhere; but when it is made in one state or country, to be performed in another state or country, its validity and effect are to be determined by the laws of the place of performance. It is to be presumed that parties enter into a contract with reference to the laws of the place of performance, and, unless it appears that the contention was otherwise, those laws determine the mode of fulfillment and obligation, and the measure of liabil-

Contract of carriage governed by law of place of performance.

ity for its breach. Daniel, Neg. Inst. 658; Byles, Bills, 586; 2 Kent, Comm. 620; Whart. Confl. Laws, § 401; Story, Confl. Laws, § 280; Scudder v. Bank, 91 U. S. 406; Brown v. Railroad Co., 83 Pa. St. 316; Bank v. Hall, 150 Pa. St. 466. The decision in Brown v. Railroad Co., *supra*, seems to be conclusive of this case. In that case a ticket was issued in Philadelphia by a New Jersey corporation operating a railroad in that state, and the plaintiff's trunk was delivered to the defendant in Philadelphia, and it did not appear where it had been lost. The liability being admitted, the question was whether the laws of Pennsylvania, limiting the amount of liability, applied. It was held that, as the service was to be rendered by a New Jersey corporation, in New Jersey, the laws of the place of performance controlled. It was said, in the opinion, by SHARSWOOD, J.: "The negligence of which the defendants are presumed to have been guilty was in the course of the exercise of their franchises as a New Jersey corporation, and the extent of their liability is therefore to be determined by the laws of that state." The judgment is affirmed.

NOTES

Conflict of Laws.—Defendant road was chartered under the laws of New York, and constructed its road from a point in the state through New Jersey and Pennsylvania and again into the state. Plaintiff purchased a ticket to ride between two points in New York, but which would require him to pass through the other two states named. He was injured in Pennsylvania, where a statute existed limiting the amount of damages recoverable. *Held*, that the damages must be ascertained according to the New York laws. Dyke v. Erie R. Co., 45 N. Y. 113. Applying Peninsular & O. S. Nav. Co. v. Shand, 3 Moo. P. C. N. S. 272. Applied in Murray v. Brooklyn City R. Co. (Brooklyn City Ct.), 27 N. Y. S. R. 280, 7 N. Y. Supp. 900.

A passenger contract to be performed in another state by a railroad company incorporated by such state is governed by the laws thereof though the ticket be purchased elsewhere. Brown v. Camden, etc., R. Co., 83 Pa. St. 316.

A contract for the carriage of goods which contains a stipulation releasing the carrier from liability for damages resulting from his negligence, will be enforced in an action in Pennsylvania according to the law of New York, if it was made, was to be performed, and the alleged breach occurred in, New York. Forepaugh v. Delaware, Lackawanna & Western R. Co., 128 Pa. St. 217, 40 Am. & Eng. R. Cas. 78.

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GUMBEL *et al.*

v.

ILLINOIS CENT. R. CO.

(Supreme Court of Louisiana, June 22, 1896.)

Use of Proper Appliances.—Railroads using appliances in common use which have been used for a long time and found sufficient to protect their own and other property from danger, should be protected against the charge of negligence because of their use. If such appliances are used, the burden of proof is on plaintiff to show they were defective, or improperly and negligently used.

APPEAL from civil district court, parish of Orleans. *Affirmed.*

Saunders & Miller (S. S. Calhoun and Marcellus Green, of counsel), for appellants.

Farrar, Jonas & Kruttschnitt and *Farrar, Leake & Lemle*, for appellee.

MCENERY, J.—On April 3, 1892, the Fireproof Cotton Press was destroyed by fire in the city of New Orleans. The fire extended to the Orleans Cotton Press, which, with its contents, was also destroyed. This suit was instituted by the owners of the Orleans Press to recover the value of the cotton burned in their press. They aver that the fire originated from sparks emitted from an engine owned and controlled by defendant while passing a pile of cotton bales on the banquette alongside of the Fireproof Press; that the sparks emitted from the engine were due to the negligence of defendant in the construction and operation of the engine, and to the defectiveness of the track at the point at which the sparks were emitted from the engine. For the origin of the fire, and the defectiveness of the track upon which the engine jolted, thus, according to plaintiffs' theory, causing the sudden energy which made the engine emit the sparks, the plaintiffs rely upon the testimony of one Ballard, which, it is claimed, was corroborated by a number of witnesses. We might, upon authority, dispose of this case by

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saying that the testimony satisfies us that the defendant company's engine was properly equipped with all necessary appliances in good order for the arrest of sparks caused by the particular fuel which the company used in the fire-box of the engine. Elsewhere, there are other, and it may be, safer appliances used, but they have not been adopted by all roads, being used principally by the Pennsylvania Central. At any rate, it is shown that different roads use differently constructed engines, with difference in size of meshes in the wire netting, and we presume that each road equips its engines according to the services it is destined to perform. We are of the opinion that for all practical purposes engine No. 109, which it is claimed emitted the sparks, was properly and effectively constructed and equipped for the arrest of sparks from the burning of anthracite coal,—the fuel which was used in the service of the engine. We had a view of the "spark arrester" used in this engine, and we are convinced that sparks of insignificant size could only be emitted under the most favorable circumstances. We understand from expert testimony that anthracite coal makes no smoke, but emits from the smokestack a light blue vapor; that the engine using it throws out fewer sparks, of a different shape than when soft coal is burned. The sparks from hard coal burning engines are, as a general rule, flakes of coal in a greater or less degree of combustion, and contain less heat than the sparks from soft coal. The sparks that pass through the netting are broken, and contain little heat. They live but a short distance in the air, say not more than 30 or 40 feet. The witness Ballard says but few sparks were emitted from the smokestack of engine No. 109, and they were the size of his little finger. No sparks of this size could have been projected through the netting with which it was equipped, unless the netting was in bad condition. The testimony is uncontradicted that the netting was in perfect condition. Locomotive No. 109 was built by the Brooks Locomotive Works, which is one of the largest works of the kind in the United States. This locomotive was designed by John Plair, the mechanical engineer of the establishment. That he is able and competent is evident from the fact of his employment by such an establishment. His testimony is important, because it rests not alone upon theory, but upon observation also. He says it is not possible to construct a locomotive that will not emit some sparks, but

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they are generally dead before they ascend to any appreciable distance and begin to fall. No. 109 locomotive was designed for "diamond stack," to use No. 12 wire with $2\frac{1}{2} \times 2\frac{1}{2}$ mesh. For the extension locomotive the general practice is to use the $2\frac{1}{2} \times 2\frac{1}{2}$ mesh with No. 12 wire, and for the diamond stack $3\frac{1}{2} \times 3\frac{1}{2}$ and No. 13 wire. Extension fronts have been in use 12 or 13 years, and were introduced by the Pennsylvania road, with which he was connected when they developed them. The universal practice of all locomotive builders is to use the $2\frac{1}{2} \times 2\frac{1}{2}$ mesh in extension fronts. He says he has run locomotives equipped with the $3\frac{1}{2}$ mesh and with $2\frac{1}{2}$ mesh, and the latter throws out no more sparks than the former. Under the same conditions, the two throw out about the same size of sparks. Ninety-two per cent. of the locomotives built by the Brooks Locomotive Works were equipped with the $2\frac{1}{2}$ netting. This size of mesh was in general use, and approved by the railroads. Experience must have demonstrated its efficiency. This particular mesh is in general use on many of the largest railroads, and the testimony is that it arrests sparks about as well as any

other. Railroads, it may be assumed, adopt appliances which will protect them from liability. Railroads using appliances in common use, which have been used for a long time, and found sufficient to protect their own and other property from danger, should, as a general rule, be protected against the charge of negligence because of their use. If such appliances are used, the burden of proof is on plaintiff to show that they were defective or improperly and negligently used. In the case of *Meyer v. Railroad Co.*, 41 La. Ann. 640, 6 South. 218, we held that when an engine was properly equipped with effective appliances to prevent the escape of sparks the burden of proof is shifted on the plaintiff, and the testimony must be very strong and convincing to establish negligence on the part of the defendant company. In this case the strong and convincing testimony is wanting.

It is unnecessary to pursue this discussion further, as we have concluded that the testimony does not show with reasonable certainty that the fire originated from sparks emitted from the engine No. 109, belonging to and operated by the defendant company on the morning of the fire. A few sparks were emitted, as stated by the witness Ballard; and he says he did not see them go on the cotton, but only in its direction. The

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fact that the cotton was set on fire by the sparks is inferred from his statement that the fire originated 20 minutes after the engine passed. The witness Ballard testified as follows: That engine No. 109 was coming down town about half past 8 or 9 o'clock, and was running at the rate of six miles an hour, with the tender in front. As the engine was passing a curve it gave a jerk, and "looked like she sorter threw her wheel off, and the engineer gave it one or two revolutions, and the engine went on down the river." When the engine jumped the track, with one wheel off, the engineer "pulled out his throttle," and the engine only stopped a second, and went on. It was this "jostle" or jump which caused the smoke and sparks to be emitted, few in number, but the size of his little finger. He says the wind was blowing towards the cotton. He did not see any of the sparks go on the cotton, because the engine was between him and the cotton. It was 10 or 15 minutes after the engine passed that he saw the fire on top of the cotton next to the Fireproof Cotton Press. This press was located at the corner of Race and South Front streets. The cotton was piled on Race street, in front of the banquette, and alongside of the Fireproof Press. It was piled in two sections, with an interval of some feet separating the two piles. The belt road over which the engine was run the morning of the fire is located along Front street, and a spur track runs from about the center of Race street into the gas yard. Where the spur track joins the belt road there is a frog, and it is at this point where the engine is said to have jumped the track and emitted the sparks. The witness locates himself at the coal office of Coyle at 6 A.M., where he remained until he saw the fire. Next to Ballard, the plaintiff relies upon the testimony of one H. A. McGregor, who states that at about 9.30 A.M., he reached the river front, having passed the cotton, in which he saw no signs of fire. When at the river front, he saw the fire in the second tier, about the second bale from the end on the side of the cotton just below the tarpaulins. The important part of his testimony is as to the time of the fire, corroborating that of the witness Ballard. The time that the cotton ignited after the passing of the engine is important. These witnesses fix the time at about 20 minutes after the passage of engine No. 109. Without referring in detail to the testimony on this point, we think it satisfactorily proved by the train men

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operating the engine that the engine No. 109 passed early in the morning, say at 7.30 A.M., and it was several hours before the fire was discovered after the engine had passed. With the wind blowing at the rate and in the direction which the witness Ballard gives it, it is incredible to suppose that after the sparks, the size of his little finger, had fallen on the cotton, it would have taken this length of time to ignite. Much stress, too, is laid upon the testimony of several witnesses that the track was rough, and in bad condition, at the part where the witness Ballard says that the engine went off the track with one wheel, and by giving additional impetus to it by applying more steam the engine gained the track, and proceeded on its way. But these witnesses go no further than to say the track at that point, where there are several rails, is in bad condition, giving the engine a lurch forward towards the frog. The testimony of the engineer and others in charge of the train denies that any such thing occurred as described by Ballard. Our experience alone tells us that it is impossible for an engine to have one wheel off the track, and by giving additional speed to it to place the wheel again on the rails. The fact testified to by Ballard was no doubt that which was observed by the witness Williams, who saw an engine pass over the same track. He says that there was a decided apparent unsteadiness in the wheels, and a lurch of the locomotive to the side of the frog. This unusual jolt or lurch was not such as would have attracted his attention unless he had been looking at the wheels of the locomotive, when he certainly would have noticed it. We do not think there was in the passage of the engine over this track such a condition as to require the extraordinary exertion described by Ballard to get the engine on the track, and to cause the unusual emitting of sparks the size of his little finger. That Ballard was mistaken we think there is little doubt. His statement as to the time of the passage of the engine is disproved, as well as the make-up of the train. Where his testimony is corroborated by one witness it is disproved by many others. The cotton was only partially covered by tarpaulins, and along the pile of cotton it was possible for it to be ignited at several points. On the contention as to what particular part in the pile the fire occurred there is a conflict of testimony. It is on top near the end of the pile to Front street; again, it is at the bottom; and again in the pile separated from the

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pile nearest Front street, near the opening between the two piles,—in an entirely different locality from that described by Ballard. Nobody seemed to know the origin of the fire. Nine months elapsed before it was discovered that engine No. 109 set fire to the cotton. An officer whose duty it was to report the fire officially stated as a theory it was ignited by a cigarette. The cotton was unprotected by efficient police, and it was not practical to notice who passed by it. It was in a public place, on a public street, and persons could go by it unobserved between the Fireproof Press and the cotton. It was as probable that the fire originated by the careless handling of a pipe, cigar, or cigarette, as by sparks from the locomotive. One of plaintiff's witnesses says he left his house at half past 9 o'clock, and lit a cigarette, and passed by the pile of cotton on his way to the river. He had passed the cotton about a half a square, when he heard the alarm of fire. He does not state that he was smoking when he passed the cotton, but, as the habit of cigarette smoking is universal, inveterate, and continuous, it may be that others also passed, and may have indulged in the habit. The mass of testimony is conflicting in some particulars, but we think the preponderance is that the engine No. 109 passed the pile of cotton several hours before the fire was discovered; that anthracite coal was used, from which no black smoke could have issued in which the sparks would be seen; and that the engine was so equipped with a spark arrester that it is not probable that sparks of sufficient size could have been emitted that would live more than 30 or 40 feet beyond the smokestack, and it is not probable that sparks of the size described by the witness Ballard were emitted from the defendant's engine; and the testimony does not convince us that the fire originated from sparks emitted from the locomotive of defendant's train. Judgment affirmed.

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LUMPKIN

v.

SOUTHERN RY. CO.

(Supreme Court of Georgia, May 19, 1896.)

Contributory Negligence.—The evidence for plaintiff, who was in the employment of the defendant as a night watchman, showing that its other employees, who were engaged in drilling cars and making up trains in an extensive yard where large numbers of cars were being constantly moved and shifted at all hours, were under no duty of giving him notice when they were about to put a car or cars in motion, and the proper inference from his own testimony being that it was incumbent on him, for his own protection, to inform them when he was about to enter or climb upon a standing car; and it appearing that he was injured at night by the sudden moving of a car laden with lumber, upon which he had climbed without informing the company's servants, in charge of the engine by which the car was put in motion, of his intention to get upon it, and that they neither knew, nor could have known of his presence thereon; and it not appearing that they were, relatively to him, in any respect negligent in the manner of doing their work,—the court was right in granting a nonsuit.

(Syllabus by the Court.)

ERROR from city court of Floyd. *Affirmed.*

The following is the official report:

Lumpkin sued the railway company for damages from personal injuries, alleging, among other things, that at the time in question, while he was engaged in the discharge of his duties as night watchman in the yards of defendant in East Rome, he found it necessary to go upon and stand upon one of the standing flat cars in the yard; that while he was so standing upon the car, without warning or intimation to him, a train of cars attached to an engine was driven with such great force and violence against the train or section of cars, upon one of which he was standing, that he lost his balance, and was thrown from the car and injured. By amendment, made during the trial, he alleged that the train of cars attached to the engine was first driven against other cars standing upon the same track, and the cars first struck ran several car lengths, with violence and force, as

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alleged, against the cars upon which plaintiff was standing, and thereby caused the injury. At the conclusion of the evidence for plaintiff, the defendant moved a nonsuit upon the grounds (1) that the evidence showed that plaintiff, by the use of ordinary care, could have avoided any negligence and avoided the injury, and that, whether there was want of ordinary care or not, any amount of negligence, operating directly or indirectly to cause the injury, would prevent his recovery; (2) that there was no evidence of negligence against defendant, and that the allegations in the declaration were not sustained by evidence; (3) that, if said allegations were sustained, it would still not show negligence in defendant under the evidence; (4) that plaintiff, as an employee of defendant, took upon himself risks usual and incident to his employment, and the evidence showed that the injury occurred from such a risk, and that, if this were not true, it was only an unavoidable accident, and that plaintiff must show that defendant was negligent, and that he was free from fault. The court held that it appeared that defendant was not shown to have been so negligent as to entitle plaintiff to recover, that it did not appear that plaintiff had been so free from fault as to entitle him to recover, and that it appeared from the evidence that it was probably an accident for which defendant would not be liable. The motion to nonsuit was sustained, and to this ruling, as well as to other rulings made upon the trial, hereinafter stated, plaintiff excepted.

One Goodwin testified: "I was passing through the yard when defendant was hurt, and was about 50 feet away. Saw the lamp fall in the corner of the car, and it rolled out on the outside. I could not tell you what caused him to fall. Don't know whether there were any cars being coupled up in there. There were two or three cars standing on the track where he was. There were two cars in the bunch he was standing on,—one a lumber car, which was south, and the other a box car, north, of it. He was standing on the north end of the lumber car, on the left-hand side. There were three cars coupled together south of these two. They were box cars. The switch engine was at the lower end. I could not swear how many cars were attached to it, but there may have been five, six, or seven. If I was to say that, just before Mr. Lumpkin fell, the switch engine attempted to make a coupling, I would not, possibly, tell the truth. I don't know.

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I tell the truth. I don't know, sir. I saw the cars rolling up north that were standing close by the cars plaintiff was on before he fell. I saw two coming up. Coats, a flagman, was standing about two or three cars below or above plaintiff. I could not tell positively. I know he got to him pretty quick after he got hurt. I could not say how close the cars attached to the engine were to the two cars rolling towards plaintiff. I don't know. I heard the cars switching when I was at the depot. When I came under the bridge, I heard them switching cars around there, just before plaintiff fell, as usual. I was about 50 feet away, the first I knew anything about the cars plaintiff was on being moved. I heard the cars hit. It hit like it always generally hits,—quiet as usual. I don't know how far you could have heard that lick. So far as that is concerned, you can hear a lick hit on a quiet, still night like that, maybe, from here to Broad street. I could not say how far the car plaintiff was on rolled after it was struck, because I don't know. Well, about the train, the first lick was a pretty moderate lick; the last lick hit, pretty rapid. It knocked the car plaintiff was on, I guess, about a car length or a car length and a half. I think the box car was on the end of the section next to the bunch of cars between plaintiff and the other." On cross-examination witness testified: "There were three sections,—one the engine was attached to, one in the middle, and one at the north. Plaintiff was standing on the second section, I think, or the first. He was standing on the middle section, which was the one which was put in motion by the first blow. That first blow was a very moderate one, such as you hear hit at any time of night. They keep coupling all night. Plaintiff was engaged as night watchman, to keep off thieves, to see that no seals were broken, and to see that all switches were in proper shape. I could not tell the distance between the section of cars the engine hit and the middle one plaintiff was standing on. It was about a car length and a half between the north section and the section plaintiff was standing on. That car only had to roll a car length and a half. The lick given was a very moderate one. The second lick seemed like it was pretty rapid,—not more rapid than they generally are. They frequently make them rapid. The yard is very large, with a great many side tracks, and a great many cars were standing all about there at that time. Two switch engines were in the

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yard,—one on this side, and one on the other. A great many couplings take place at night. If I was standing on a car, I would be looking for a coupling at any minute. That may be expected by everybody. It would be dangerous, if he were not connected with the crew, to go on a car without notifying the engineer. I won't say positively that I heard anybody talk with plaintiff about what to do and what not to do. I heard Mr. Bennett, the train master, tell him that if tramps came in on the trains, to let them pass through, and down the road, and not to get them off here in Rome, in the yard, and in that way keep from crowding the yard with tramps." On redirect examination he testified: "Bennett told him that in the yard office. I don't exactly know how long before this accident, but it was before. Plaintiff had been watchman, I expect, a month or two. I don't know how many months he was watchman there in all. I done forgot which section of cars plaintiff was standing on when it first hit. I talked to no one at all about this case after I left the office we were in before dinner. Have not talked to anybody about nothing, and nobody has talked to me." On recross he testified: "Plaintiff worked there in that yard, to my knowing, three or four months while I was there. Night couplings were going on all the time."

Plaintiff testified: "I was going down through the yard. On the main line I looked into the door of a car, across on one of the crosspieces, and saw a man standing in the corner. The brakeman of that train was on the opposite side, and flashed his lamp in, and discovered another. I told them to get off, and get out of the yard. They crawled off the car, and went on down the line under a car. I took my lamp, and looked into the empty boxes on the track, and went on down, and came to a lumber car, loaded with lumber 16 or 18 or 20 feet long, and the south end of the car was just a flat car, with no railing on it. When I got to that car, I could not see on top of the lumber in order to search for these tramps. I got on the flat part of the car, and got up, and put my left hand on the lumber, and raised the lamp with my right hand, when the crash came from down the road up towards the depot, and knocked me beneath. A box car was south of where I was standing. The cars between those on which I was standing were first struck by the train attached to the engine and knocked against the cars I was standing upon.

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The crash came from the south, upgrade, and threw me right backward, and I came in contact with the drawhead or something, and fell square across the rail, and jumped back, and the brake beam of the box car took me in the back, and slid me along the track some distance, and I threw my feet lengthways, and the car rolled past, on by me, nearly a car length. I don't know how many cars were south of me when I had fallen. It looked like four or five. It is a little upgrade from the place where I was hurt all the way up to the depot, and a car without brakes would not stand there, but would roll south. I fell because of a sudden crash coming to the cars from the south, that knocked my feet square from under me. I had been in the yard 10 or 11 months. I had instructions from Bennett, the general manager or superintendent, to put off the tramps. He told me I had been reported for leaving parties on the trains, and that thereafter I must keep people off of the cars, and out of the yard, and that it was my duty, and I must do it, and I was more particular after that than I was before to keep parties from the yard. I would go on cars in the yard every night two or three times. I was the only night watchman at that time, and was on the cars every night. There were several cars scattered in a bunch here and there about the yard. I did not see the moving cars coming towards me. If I heard them moving, I paid no attention to them,—just as other cars were making a good deal of fuss in the yard, and I was not expecting such a hard lick. I have seen an ordinary lick that don't give a man any jolt at all. There were two box cars and a lumber car in the bunch I was standing on. With an ordinary strike to couple onto three cars, it would not have jolted me at all. As compared with other licks, it was very hard. I knew, before I got on, that there was another section between me and the engine. I was not expecting that sort of a lick, because they generally couple to the first section, and then come up and couple to the other. They ran against that section, and ran up against the section I was on without coupling. The coupler had not got to that section. The engine was blowing off steam, and there was a good deal of noise in the yard at the time. The yard limits are about a half mile each way from the depot, and the cars stand pretty much all over the yard. Part of my business was to detect thieves, and I had to conceal myself sometimes. I did not frequently hide myself to catch thieves up there in

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that part of the yard. I did at the lower end. I went over the yard every night, just to suit myself. Nobody knew where I was going, and nobody knew just where to find me on these expeditions looking after thieves. The switch engine crew generally knew where I was. Always saw me, and kept up with me. I frequently got out of their sight. Nobody knew just where I was always. They might find me in one part of the yard just as readily as the other. Couplings were going on every night, and I knew they constantly coupled cars. I did not notify the engineer that I was going on that car. It was not necessary. I was not connected with that train in any way. I could not have stayed off of that car, and done my duty. Nobody commanded me to go on that car, or to go on cars, on that particular night. I did not know they were coupling up that particular train, nor that the switch engine was on the track just below me. I did not know whether the engine was at work down there. I did not hear it at all, and did not know which part of the yard it was in. I supposed it might be down there. That would not bother me at all. If I had known it was down there on that track, I would have gotten on that car. There were two flagmen connected with that train, and I suppose they were three or four car lengths from me, I don't know exactly how far. I did not go and tell one of them. It is their business to slack down the train at the proper time. I did not give a signal. I could not tell how far south of me was the car which struck the one I was standing on. I saw the section of cars there, I suppose about three car lengths. They did not move slowly up, but moved fast enough to knock me off. I did not see it when it came and struck the car. They struck it a hard lick. I don't know how fast it came. I did not see any cars moving before I was struck. If I had looked down that way, I could not have seen them moving, because a box car was in front of me. If I had stood on the ground, I could have seen them moving. When I got on there I knew I could not see a train coming behind that box car. I cannot say whether there was one lick before that I fell from. Both licks were so near together I did not know any distinction at all. The car below me had to run about half a car length before it struck the one I was on. There were two cars between me and the space, and then the space. I don't know exactly how wide that space was, and did not say, in the former part

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of this examination, that there was the space of three or four car lengths in there. It was necessary to strike the other section before the car struck the one I was standing on, if they coupled it up. They would have to come up to it to couple. Very often they come to it without making a noise. A proper coupling makes very little noise; that is, a very moderate lick. I expected cars to be coupled on at any time during the night. When I was watching, they were making up a train. I suppose the main body of the train was on the main line. When I got on the car, I had my hand against the scantling, but did not grab it as I would grab to keep me from falling. It was not necessary. I was probably three or four feet from the end of the car when the blow was struck. When a man is standing without holding to anything, a lick of considerable force will throw him. I never saw them couple that hard a lick, and I have been on them a good many times. They seldom strike considerable licks. Sometimes you hear them bump all over the yard. I have heard it hit a considerable lick. It takes a right smart lick to throw a man from his feet. Sometimes they hit a right smart lick; very seldom and unusual. I have heard them sometimes break drawheads. They could not see the lamp down the track. I never thought anything about it. Had no idea the cars were coming together so hard. I always expected ordinary licks when I got on, and guarded against them. I had nothing to take hold of to keep me from falling, if they hit a hard lick, except the scantling. I could have taken a position on the end of the lumber car, and put my hand against the box car. The lumber was about as high as my head. Had to tiptoe to see on it. My lamp, held up, would throw light over the top of the lumber. I could not stand on the end of that car, and see over the top of the lumber, because of the posts right in front of the standards. Had to look over them. I could not have tiptoed and done it, because I could not have seen over there. The lamp would not throw light over anything. It would not throw light over the lumber car. It was a very poor lamp, and belonged to defendant. I had asked them for a different lamp. They never gave me one. I couldn't have hollered to that flagman, because it wasn't necessary. I could have hollered. I could not have told the flagman, because, when I got on the car, he had gone around with the switch engine. When I got out, he was about three cars dis-

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tant, coming up to me. I don't know how far he was when I got on. I have no recollection as to whether I looked for him or not. If I had been looking out for the train to strike, I could have prevented it probably, if I had grabbed hold with a deathhold. If I had been looking out for an ordinary lick, I could not have prevented this fall. An ordinary lick could not have dealt me that sudden a crash. If there was a second lick, I did not know anything about it. I think there was only one. I cannot tell the distance between the section I was on and the section north of it. I did not know where the engine was, and don't remember when I last saw it. I never noticed whether there was a ladder on the car right in front of me. I could have gone on the box car, and looked down on the lumber, but did not do it. If I had gotten on top of the car, I could have looked down the track, and would have seen the engine, and could have seen the lumber as well as where I was. If I had been in the box car, I could have also seen the engine as it was coming back, probably. Don't know that I could. May have seen it, but may not have known which track it came on. I could not have seen which track it was on, because it came into where several tracks came together. If a section of cars had begun to move, I could have seen it on the box car. It would not have been the safest there. It would have knocked you off. Might not have seen it coming in time to get on the side. It would not have been the safest position up there. It would have been higher. Might have seen the engine. A man could grab a brake while on the top of a box car sometimes. There was a brake on the flat car which I could have grabbed, so as not to get knocked off, at the right end; but there was no brake at the end where I was. I could not get on the other end, because the lumber was stacked too close to that end. If I had gotten on the ladder on the box car I could have seen over the lumber car. I could have held on. I have held on to the ladder several times. It might have knocked me off there. Could have held against a heavy crash on the ladder. If I had fallen from the side, would probably have fallen on the ground outside. I think the moon was shining a little that night, but can't tell how far you could have seen a man. Could not see 50 yards unless you had a light. I guess it was not very easy to see me; pretty hard to see me when I got behind the box cars. A man standing on the

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engine could not have seen me. He could have seen the light while I was getting up, but not after I got up. You could see that poor lamp probably 200 yards. I suppose, out from the end of the lumber, the braces were two or three feet. If I had examined, I could have seen; but did not examine. I reckon I can reach two feet. It might have been a little better hold on the brace than on the scantling. I could not hold the lamp, and hold with both hands. I could have easily set the lamp on top. I did not get up there to camp. I could have held with both hands if I had been looking out, making myself entirely safe. Bennett never gave me any instructions to allow tramps to go through. I was looking for an ordinary coupling, probably coming together and taking the slack out. There is generally about 12 inches of slack to the car. It generally knocks out a couple of slacks. This lick was a great deal harder than ordinary couplings. It was a solid knock-out, you might say,—a solid lick. Don't remember of ever seeing but one drawhead broken during the time I was there. I never examined the engine to see if it was in good order, and did not know whether it was in good shape to do its work." There was further evidence as to the extent of plaintiff's injuries, his age, loss of capacity, earnings, etc.

One Estes testified: "I was employed over there about three months as night watchman. My duty was to see that there were no tramps around or on the cars, to put them off the cars and out of the yard, and examine the seals to the cars, etc. To examine the seals on the end doors you have to get up on the drawheads. I always got on the cars to see if there were tramps or anything up there. That is the only way I ever found to do it. Every night, I think, I was on the cars. There is no danger in going upon the cars there, I think. There is no danger in a man being on a car when it is being coupled up and switched about, unless the engine comes back very hard, and hits the car a very hard lick. A watchman should not do anything but go on a car and see if tramps or anything like that are on there. Cars should come together in couplings so they can be coupled without any danger to the coupler and the cars, not moving but very few feet. On an upgrade, the car hit ought not to move any at all, if the engineer comes back properly. That has been my observation. I have run as conductor on freight and passenger

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trains. If an engine is pushing upgrade from 10 to 12 cars, and comes to a standstill, the balance of the cars go forward until they take up the slack. When I was watchman there I went all over the yard at any time. Looked after tramps and thieves. Frequently nobody knew where I was. Cars are coupling there all the time. Can hear couplings made all over the yard. They don't frequently come up pretty hard. Seldom they are different in force. Sometimes they are hard. They are very cautious in that yard. To a casual observer every lick would seem about the same. On an upgrade, if an engine strikes a car, and it is pushed on up to another car, with a brake on the standing car, and the engine strikes that car, and it is carried and strikes another, I don't think the second stroke can be harder or altogether as hard as the first. It would be safer, upon going on a car where a coupling is being made, to notify the conductor or engineer, and might be safer to notify the brakeman. It was not the custom with watchmen to notify the brakeman. You never knew what sort of licks were coming with certainty. It is very likely to be a very hard lick at any time. It would be safest to guard against hard licks. If you were standing on the end of a flat car, and the lumber did not go as high as your head, I don't think you could, with convenience and safety to yourself, stand with your hand against a box car that might be attached right behind you, and look over, because the coupling is too wide, and you would have to creen your body over. I suppose, when a man is off his guard, he can be thrown from his feet by a small lick. It takes a pretty severe lick to throw one from his feet if he is on his guard. If lumber was piled as high as your eyes, and you were on the top of the box car, you could see over it. If you were to climb on the ladder, with your head above the lumber, I don't think you could see without inconvenience. A man might possibly have a good light and see. A lamp throws light over the length of a car if you hold it in the right position in climbing. Would have to turn loose one hand to hold the lamp with. You could do that in some cases where the lumber is not too high. The engineer could not see you unless you were on the side of the car. If I had reason to believe that an engine was below me coupling cars, while I would be a little in doubt, I think it would be safer if the light were where he could see it. It would be safer on the ground altogether. The most safe way

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a man can be on a car, if he were going there to protect against all possible hurt, would be to lie right flat down on the car. The usual and ordinary way for a watchman, in the discharge of his duties to get on such a car to examine it, is to go right on the end of the car the lumber was not on, and, if necessary, climb over it. The only reason I can give why it would be safer to let the engineer know the watchman was on the train is he might take extraordinary precautions against danger if signals were placed there. It would not be any benefit to the watchman for the engineer to know that he was on the cars. In the case of a careless engineer, it might be more safe. If an engineer were discharging his duty ordinarily, it would not make him be any more cautious to know the watchman was on the car."

Upon the trial Goodwin testified, being introduced as a witness for plaintiff: "There were two cars in the bunch he [Lumpkin], was standing on,—one a lumber car, and one a box car. The box car was standing north, up towards the depot. The lumber car was south. He was standing on the lumber car on the north end,—the north end of the lumber car on the left-hand side. I heard the cars hit. It hit like it always generally hits,—quiet as usual. I could not say how far the car that Mr. Lumpkin was on rolled after it was struck, because I don't know." After the witness had testified as herein stated, counsel for plaintiff asked the witness the following question: "Didn't you tell me this morning, in the presence of Mr. Albert Ewing—" At this point defendant's counsel objected to the question being asked. The court ordered the jury to retire, and Mr. Dean, of counsel for plaintiff, made the following statement: "This witness told me, in the presence of Mr. A. G. Ewing and Mr. W. W. Vandiver, that that car, upon which Mr. Lumpkin was and fell from, rolled a car length or more after it was struck. He told us, furthermore, that the cars that came towards it struck the standing cars that were off about a car length further,—came with very heavy force, and struck these two cars standing, and drove them against the one Lumpkin was on in an unusual and severe manner. He told us that he was near by and saw it, and had no hesitation in telling us these things. He said, furthermore, there were three cars in the bunch Lumpkin was standing on,—one a lumber car, and the others box cars,—a lumber car and two box cars driven

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against him. This was his statement to us, and we relied on it, and I have asked him questions expecting him to tell the same things to-day. We have been entrapped, and it has not been three hours since he told us that." Mr. W. W. Vandiver, of counsel for plaintiff, made the following statement: "My recollection of what was said is substantially what Brother Dean has said, with the simple exception that he said two car lengths,—certainly not less than one, maybe two. That is my recollection of the distance that he said the cars were stricken back. After that talk with him, he called me in the hall out here, and says, 'Mr. Vandiver, I am afraid I am going to have trouble about testifying here.' I said, 'What trouble?' He said, 'The railroad people have sent word they were going to give me trouble if I testified here.' I said, 'Who sent such a word?' He said, 'Mr. Bennett.' I said, 'Who brought the word, and what was the word?' He said, 'They would give me trouble for being in the yard while I was not employed by the company. He said it was going to give me trouble.' I asked him what was the man's name who brought the word. He said he didn't know what his name was. I told him I would protect him against the railroad, which seemed to relieve his mind, and I left him in what occurred to me to be a less perturbed state of mind than when he first came to me. Therefore, relied on his statements being just the same as he had made to us." Mr. Dean further stated that the witness said "it hit a severe and unusual lick." After these statements, the court directed that counsel had to lay the foundation for contradictory statements, but that he could lead the witness. Thereupon the jury was returned to the box, and the examination of the witness proceeded, but counsel for plaintiff were allowed to ask the witness leading questions. To this ruling plaintiff excepted. Upon the direct examination of the same witness he testified: "I did say to Mr. Dean, and Mr. Vandiver, and Mr. Albert Ewing, and Mr. Ben Lumpkin, to-day, in Judge Harris' room, just across the hall there, in the corner of this building, a little while before court adjourned, that the car Mr. Lumpkin was on and fell from was driven a car length or more by the cars that ran against it. That is right. Them cars hit against the car Mr. Lumpkin was standing on pretty hard." When this testimony was delivered by the witness, counsel for plaintiff asked the following question: "How far

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was the second car from the car Mr. Lumpkin was on?" Before the witness replied to this question, counsel for defendant moved to rule out the evidence just previously stated by the witness, to the effect that other cars than the ones attached to the engine ran against the cars that Lumpkin was on, as it was different from the allegations in the declaration, and set up a different cause of action. The court thereupon stated that, as the declaration then was, it would rule out that part of the testimony objected to which showed that the lick received by the car Lumpkin was on was from the striking of other cars between the cars attached to the engine and the car Lumpkin was on; the court stating that this testimony made a different cause of action to that stated in the declaration. To this ruling plaintiff excepted. After this ruling plaintiff amended the declaration as hereinbefore mentioned, and the testimony of the witness was afterwards admitted, to the effect that there was a section of cars between those attached to the engine and those upon which plaintiff was standing, and that the intervening section was struck by those cars attached to the engine, and driven against the car upon which plaintiff was standing.

Plaintiff testified that the engineers and other employees of the defendant company knew it was the custom for him, as watchman, to go upon the cars in the yard at night. This testimony was ruled out upon objection of defendants, and to this ruling plaintiff excepted. Plaintiff further testified: "In an ordinary lick, the cars generally have the slack all taken out of the cars for four or five cars. Ordinary couplings knock the slack out of about three cars." This testimony was ruled out upon objection of defendant, and to this ruling, also, plaintiff excepted.

Plaintiff's witness Dr. Harbin testified "that the pain to plaintiff's hand would continue to be painful indefinitely." Plaintiff's counsel asked the question, "Would that pain be permanent?" To this question, and the testimony sought to be obtained from the witness, defendant's counsel objected, upon the ground that testimony as to future pain was speculative, which objection the court sustained. To this ruling, also, plaintiff excepted.

Plaintiff's witness Estes, after testifying that he had been a watchman in the yard in question, was asked: "State what necessity there is for a watchman giving the engineer notice

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that he is going on a car." Defendant objected to this question, and the objection was sustained. To this ruling, also, plaintiff excepted. The same witness further testified: "No watchman would be hurt if the cars were properly coupled,—if the engine came up in a proper way." This testimony was ruled out on objection by defendant, and to this ruling, also, plaintiff excepted. Plaintiff's counsel asked the same witness the following question: "What would an ordinary watchman, in the discharge of his duties, do, if he wanted to examine that lumber car, loaded with lumber that did not come within four feet of the end of the car? What would be the ordinary, proper, and usual way for him to go on that car?" This question, and the testimony sought thereunder, was objected to by defendant's counsel, upon the ground that it was a question for the jury to decide, and that the witness can only prove facts and let the jury draw conclusions. The court ruled that it would allow plaintiff's counsel to ask, "What would be the usual and ordinary way for a watchman, in the discharge of his duties, to go on a car under such circumstances?" but declined to allow the question answered as put by plaintiff's counsel. To this ruling, also, plaintiff excepted. Plaintiff's counsel asked the same witness the following question: "Would it be a usual or unusual stroke for an engineer, in coupling cars, and having from eight to twelve cars attached to his engine to move up grade, strike two cars that were standing on the track with brakes on, and knock them a car length, and hit three other cars standing on the track with brakes on, and drive the last three cars a half or a car length?" To this question, and the testimony sought thereby from the witness, defendant's counsel objected, and the court sustained the objection, and refused to allow the question answered. To this ruling, also, plaintiff excepted. Plaintiff's counsel asked the same witness the following question: "Would it be usual [for such a stroke as that indicated in the last preceding paragraph of this bill of exceptions] to take place in a well-regulated yard, such as the Southern Railroad?" To which question, and the testimony sought thereby from the witness, counsel for defendant objected. The objection was sustained by the court. To this ruling, also, plaintiff excepted. Plaintiff's counsel asked the same witness: "How often does such a stroke as that occur?" meaning the one stated hypothetically in the second paragraph above. To which question

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the witness answered: "I never knew one to occur." Plaintiff's counsel asked the witness the further question: "Keeping the hypothetical state of facts in mind, I will ask you how often such a stroke as I stated a while ago,—how often would such a stroke take place?" The questions and testimony, as stated, were objected to by counsel for defendant. The objection was sustained. To this ruling, also, plaintiff excepted.

After plaintiff had closed his testimony, and rested his case, counsel for defendant stated to the court that he wanted to ask one more question of the plaintiff on cross-examination, to which counsel for plaintiff objected. The court overruled the objection, and allowed the question asked. Under this examination, and in response to these questions, the plaintiff testified: "I never examined that engine, that was attached to those cars that night, to see if it was in good order. I did not know whether it was in good shape to do its work." To this ruling, also, plaintiff excepted, alleging that, after he had rested his case and closed his testimony, defendant had no right to cross-examine him.

W. W. Vandiver and *Dean & Dean*, for plaintiff in error.

McCutchen & Shumate and *Hoskinson & Harris*, for defendant in error.

PER CURIAM.—Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

BOYD

v.

HARRIS *et al.*

(*Supreme Court of Pennsylvania, July 15, 1896.*)

Assumption of Risk.—A brakeman was killed, while on a train, by striking against a cattle chute on a siding close to the track. It was proven that he had taken cars out of the siding before, and had for two months been passing the chute constantly. *Held*, that the question of assumption of risk was not for the jury, but that the court should have declared, as a matter of law, that he had assumed the risk.

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APPEAL from Cumberland county court of common pleas.
Reversed.

J. W. Wetzel, for appellants.

A. G. Miller and *W. F. Sadler*, for appellee.

WILLIAMS, J.—This case presents a question, the importance of which extends far beyond the present parties, and the judgment to be entered herein. It is whether the location of the permanent structures along a line of railroad, necessary to accommodate its business, is to be determined by the railroad company, or by a petit jury. If by the former, they may be located with reference to the convenient and economical use of the railroad, and the accommodation of its traffic. If by the latter, these considerations will be lost sight of; and the proper location will be a shifting one, to be settled by each successive jury in accordance with its own notions and the peculiar features of the case on trial. One jury may hold a given location to be safe and proper. The next jury may hold it to be unsafe, and therefore improper. There are many such structures necessary to the operation of a line of railroad. Among the more important of them may be mentioned the bridges, station houses, grain elevators, warehouses, water tanks, coal chutes, cattle chutes, signal stations, and tool houses. The position of these buildings, with reference to the track of the railroad, their size, the mode of construction, must be determined with reference to their purpose, and their convenient use as a necessary part of the physical plant of the railroad company. Where they shall be placed, and how they shall be arranged, are questions that belong to the railroad company, as truly as the location of the switches and sidings, or of the track itself; and the discretion of its officers is no more under the control of a petit jury in the one case than in the other. This discretion is to be exercised in view of the conformation of the surface, the character of the business to be accommodated, and the convenience of the servants and employees by whom it is to be carried on. It is part and parcel of the work of construction, and is governed by the same principles. If any of these structures are so located as to involve unusual danger to employees operating the railroad, it is the duty of the company to advise such of its employees as are exposed to the danger, of its existence, or afford them an opportunity to know its character and extent

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by observation. On the other hand, the employees, when they take service upon a railroad, know that it is a service which exposes them to many dangers necessarily incident to the employment. The risk of these dangers they assume when they accept the employment. As between themselves and their employer, they undertake to exercise the measure of attention and care necessary to protect themselves from such dangers; and if they fail in this respect, and suffer injury in consequence, they are remediless. Our sympathies may be roused by the maimed employee, or in behalf of his helpless widow or orphaned children, but we are not at liberty to gratify our sentiments by charging against the employer the consequences of the folly or the neglect of the employee. This is well settled. It was said in *Railroad Co. v. Sentmeyer*, 92 Pa. St. 276, that an employee assumes the risk of all dangers incident to his employment, however they may arise, against which he may protect himself by the exercise of ordinary observation and care. When he has been warned of the existence of any particular danger, or has had opportunity to learn of its existence, he is bound to take notice, and to bring into his own service the requisite measure of observation and care for his own protection. This is an implied term or stipulation of his contract of service. He is bound to use his senses, and he "assumes such risks as are incident to the employment from causes that are open and obvious, the dangerous character of which he has had an opportunity to ascertain." *Brossman v. Railroad Co.*, 113 Pa. St. 490. This assumption embraces all such risks arising from his employment "as he knew, or, in the exercise of a reasonable degree of prudence, might have known," to be incident to his employment. *Schall v. Cole*, 107 Pa. St. 1. But descending from the statement of the general rule, and applying it to particular facts, the cases are numerous. It was applied by this court in *Kelly v. Railroad Co.*, decided in 1887, and reported in 11 Atl. 659, to a case in which the danger arose from the location of an oil house between which and a passing train the distance was but eight inches. In several cases collected in *Gaffney v. Railroad Co. (R. I.)*, 7 Atl. 284, it was applied to lumber piled near to the track. In *Lovejoy v. Railroad Corp.*, 125 Mass. 79, to a signal post. In *Wilson v. Railroad Co.*, 85 Atl. 269, to a water pipe. In *Gibson v. Railway Co.*, 63 N. Y. 449, to a projecting roof.

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To an overhead bridge in *Railroad Co. v. Rowan*, 104 Ind. 88, 23 Am. & Eng. R. Cas. 390. Cases are collected in 14 Am. & Eng. Enc. Law, 850, holding the same rule for other states, including Iowa, Maryland, Michigan, and New Jersey, and it seems to prevail very generally in this country.

The question was raised in this case by the seventh point on part of the defendant, which asked an instruction to the effect that the "deceased, for nearly two months, passing almost daily, and sometimes several times a day, the point at which the accident occurred, and having taken cars out of the siding before, is presumed to have had knowledge of the situation of the structures at this point, and to have assumed the risks of his employment, and dangers incident thereto, and the verdict must be for the defendant." This point was refused, without any qualification or explanation, and the jury was told that "it will be for you to determine whether he had knowledge of its situation; that is, of its proximity to the siding." The point asked the court to declare the legal effect of certain facts that were not in dispute, as matter of law. The answer turned the question over to the jury to be solved as a question of fact. The plaintiff's right to recover rested on the position that her husband had been exposed to an undisclosed and unknown danger, and had lost his life in consequence. The defendant's answer was that the danger was open and obvious, arising from the position of a structure that the deceased had passed many times, and, on one or more occasions, on the track of the siding where he was when the accident occurred. The facts set up in this answer were not denied. What was their legal effect? This the court was asked to declare. The duty to observe, and make himself acquainted with, the obvious dangers to which his employment exposed him, was on the deceased. The opportunity to observe, and acquire a knowledge of, these dangers had been enjoyed by him for many days. Under such circumstances, the fair legal presumption is that he had improved the opportunity to observe, and discharged the duty towards himself and his employer which his service required of him. If this proposition be denied, then for how many more months must an employee pass a point of danger daily before the presumption will arise? Will it ever arise? Or must the question of actual knowledge be turned over to the jury to guess at in all such cases? The

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point was wanting in clearness of arrangement and expression, but it brought the attention of the court to the controlling question in this case as it is presented on this record. It was a question of law, if, as we understand, the facts grouped in the point were not in controversy, and it should have been treated as such. There is some evidence tending to show that the track of the siding had been changed and brought nearer the cattle chute at one time, but it does not appear whether this was before or after the deceased had been upon the siding, or before or after his entering the service of the defendant company. If before, he was warned to take notice when the opportunity to observe came to him. If after, he was entitled to notice, or to a fair opportunity to observe. The first assignment of error is sustained, and the judgment is reversed.

CHICAGO, B. & Q. R. Co.

v.

HAGUE.

(Supreme Court of Nebraska, April 10, 1896.)

Presumption of Negligence.—Under the provisions of section 3, art. 1 c. 72, Comp. St., it is only necessary, to a right of recovery against a railroad company, to show that the person injured was, at the time, being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or that it was the result of the violation of some express rule or regulation of said railroad company actually brought to the notice of the party injured.

Criminal Negligence.—Criminal negligence, as the term is used in the statute, means such negligence as amounts to a flagrant and reckless disregard of one's own safety, and a wilful indifference to the injury liable to follow.

Case at Bar.—Evidence examined, and held to so clearly disclose criminal negligence on the part of the person injured as to permit no reasonable inference to the contrary.

ERROR to Kearney county district court. *Reversed.*

W. S. Morlan, J. L. McPheeley, and Marquett & Deweese,
for plaintiff in error.

L. W. Hague and Stewart & Munger, for defendant in error.

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IRVINE, C.—This was an action under Comp. St. c. 21, by Hague, as executor of Robert P. Stein, deceased, against the Chicago, Burlington & Quincy Railroad Company, on account of injuries causing the death of decedent. The plaintiff had a verdict and judgment for \$4,000. Case stated.

The sufficiency of the evidence to sustain the verdict is presented for review by a direct assignment of error, and also by an assignment based on the refusal of the court to give an instruction directing a verdict for the defendant. In support of these assignments the railroad company contends—First, that the evidence does not in any manner tend to charge it with negligence; and, secondly, that the uncontradicted evidence discloses that Stein was guilty of contributory negligence.

The first argument is completely answered by the uncontradicted proof that Stein was a passenger, lawfully riding on a train of the railroad company, when the injury was inflicted. Chapter 72, art. 1, § 3, Comp. St., provides: Presumption of negligence. “Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice.” The railroad company contends that the phrase, “damages inflicted upon the person of passengers,” indicates that, in order to charge the railroad, it must appear that the injury was the result of some negligent omission or commission on the part of the railroad. This construction is not tenable. In *Railroad Co. v. Baier*, 37 Neb. 235, it was held that, under this statute, it is necessary to prove only that the injured person was a passenger being transported over the line of railroad of the defendant, when damages were inflicted upon the person of such passenger; that proof of such facts raises a presumption of negligence on the part of the railroad company, which can be rebutted only by proof of negligence on the part of the passenger, or the violation by him of some express rule or regulation of the railroad actually brought to his notice. This construction has been followed in *Railroad Co. v. Porter*, 38 Neb. 226, in *Railroad Co. v. Hedge*, 44 Neb. 448, and in other cases, and it is undoubtedly correct. It was therefore unnecessary for the

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plaintiff to prove that Stein's death was caused by any specific negligence on the part of the railroad.

We preface a consideration of the evidence with relation to the second argument with the remark that, the case being within the statute, it was insufficient for the railroad company merely to establish such a degree of negligence on the part of Stein as would prevent a recovery in ordinary cases of personal injuries. The statute requires, as a defense, that the person injured should have been guilty of "criminal negligence."

In *Railroad Co. v. Chollette*, 33 Neb. 143, this court approved an instruction to the effect that "criminal negligence," as the term is used in the statute, means gross negligence,—such negligence as would amount to a flagrant and reckless disregard of one's own safety, and a willful indifference to the injury liable to follow. In later cases the foregoing has been accepted as a correct interpretation of the statute. It must also be borne in mind that it is the settled law of this state that, even where the facts are undisputed, the question of negligence is for the jury, where different minds may reasonably draw different inferences from those facts. This rule has been many times announced, and was applied in *Railroad Co. v. Landauer*, 36 Neb. 642, and *Id.*, 39 Neb. 803, where the court examined the evidence in a similar case, and held that it permitted no reasonable inference except that of criminal negligence on the part of the person injured. Therefore, the question presented to us is not whether, to our minds, the evidence here discloses that Stein was guilty of criminal negligence, as above defined, but rather whether, under the facts disclosed, any other inference is reasonable. If so, we could not disturb the verdict. With these principles in view we pass to an examination of the evidence.

Stein lived at Minden. He boarded a west-bound freight train, carrying passengers, at Hartwell, the first station east of Minden, for the purpose of returning home. The passengers, including Stein, were in the caboose, at the rear end of the train. The train arrived at Minden about 2 a. m. The night was misty and dark. About 1,300 feet east of the station at Minden, there is a bridge, some 20 feet high. Five hundred feet east of the station there is a switch leading to a side track. As the train approached Minden, it stopped at such a point that the caboose

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stood upon the bridge. It seems that this stop was made for the purpose of taking the side track, to permit a passenger train to pass, and that it was made at this point because the front end of the train was then at the switch. The passenger train not being due for about 10 minutes, the interval was availed of for the purpose of uncoupling the engine and running it on to the station for water. This maneuver left the caboose upon the bridge for several minutes, and, during that period, while there is no direct evidence on the subject, it is quite clear, from inference, that Stein passed out the rear door of the caboose, and fell to the ground beneath the bridge, probably in an attempt to alight from the train. The railroad company claims that the evidence shows that Stein had received, and had understood, an express warning that the caboose was on the bridge, and that he attempted to alight in spite of that warning. The plaintiff contends that, on this point, there was a conflict of the evidence, which must be resolved in his favor, in accordance with the verdict of the jury. On the argument it was practically conceded that the question of contributory negligence turned on this point. The plaintiff frankly conceded that, if Stein attempted to alight in spite of an express warning as to the situation of the caboose and the danger of the attempt, negligence on his part would be established. On the other hand, it was practically conceded that his attempt to alight, in the absence of knowledge on his part of the situation, would not present so clear a case as to justify the withdrawal of the issue from the jury. The conclusion we reach is such that we may assume, for the purpose of this case, that the latter position is correct. There is no doubt that the conductor gave a general warning to the passengers not to get off, stating, as a reason, that the caboose was on a bridge; and our effort is therefore to ascertain whether or not there was a conflict in the evidence as to whether Stein understood this warning. If the evidence was conflicting, the finding of the jury for the plaintiff must, on this branch of the case, be taken as conclusive.

There were, in the caboose, when the train stopped, the conductor and five passengers. At the east (the rear) end was what is termed the "cupola." The conductor had been sitting in this. From this cupola west extended seats, on either side, on which the passengers were sitting or reclining. Mr. Martin, one of the passengers, was not a witness. We have the testi-

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mony of the other passengers and of the conductor. The conductor was called by the defendant. He testified that, when the train stopped, he saw that he was on a bridge. He descended from the cupola, and told the passengers that they were at Minden, but not to get out as they were on a high bridge. Then he stepped to the east door, and Stein stepped up beside him. Then he went to the west door. He then returned and reascended to the cupola, when he heard a groan, and descending, found that Stein was missing. Then comes this testimony: "Q. What, if anything, did you say to the passengers or to Mr. Stein before you went up in the cupola? A. I told them not to get off; we was on a bridge. Q. What, if anything, did Mr. Stein say to you? A. He says, 'Thank you. Thank you.' He thanked me two or three times. I do not remember just the words that he used." This rather obscure testimony is much cleared up by the cross-examination: "Q. What did you say you did the first thing when the train stopped? A. I was up in the cupola when the train stopped, and I got down. Q. At once? A. Yes, sir. Q. Then what did you do? A. I told the people that we were at Minden, and not to get off; that we were on a bridge, and to wait until we got up to the depot. Q. Then where did you go? A. I walked to the east door. Q. Did you stop there awhile? A. Yes, sir; probably half a minute. Q. What part of the car were you in when you told the passengers not to get off? A. Well, about the center of the car. Q. You were not at the west door of the car when you said that? A. No, sir. Q. You did not go out the west door of the car after you said that? A. Yes, sir. Q. Not immediately? A. No, sir. Q. You went back to the east door? A. First. Q. And afterwards went out of the west door? A. Yes, sir. Q. How long did you say you stayed at the east door? A. Half a minute. * * * Q. Mr. Stein spoke to you on the rear platform, and thanked you,—he thanked you, some place, for telling him that he was on a high bridge? A. I say the east door; he thanked me, first, when I got down, and thanked me a second time." Mr. Kelley, one of the passengers, says that his attention was first called to Stein when he noticed him standing in the middle of the car, acting as if he was about to get out; that the conductor then told him that they were not at Minden yet, but were on a bridge, and would pull in on a side track to let an express go by; that Mr. Stein

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thanked him two or three times. The conductor then started for the front end of the car. Kelley does not know what then became of Stein. The foregoing is the testimony on which the railroad company relies. Following is the testimony adduced by plaintiff, and which, he claims, presents a conflict: Mr. Smith says he was on the north side of the caboose near the middle. When the train stopped, the conductor, preparing to go out over the train, said: "Don't get off; the caboose is standing on a high bridge." He was in the act of going out to the west when he said this. The witness was asleep, and the words of the conductor awakened him. He thinks Stein also sat on the north side of the car, and east of him. On cross-examination he says that, when the conductor spoke, he was just a few steps from the witness, and, he thinks, nearer the west end of the car than the center. Mr. Johnson was on the south side of the car, near the cupola. Mr. Martin, he says, was on the same side. Johnson also had been asleep. When he awoke the conductor was a short distance west of where he was lying. As Johnson awoke, the conductor made the remark which the other witnesses testify to. He then went out the west door. Another feature of the testimony of this witness is significant. When he awoke there were only two men on the north side. These were Smith and Kelley. Within a minute and a half of the time the conductor left the west door, Johnson saw some one go out the east door. This must have been Stein, although Johnson could not identify him.

The writer, after a somewhat careful examination of the evidence, was at first of the opinion that there was something of a conflict between the testimony of the conductor and Kelley on the one side, and that of Johnson and Smith on the other, and this because Johnson and Smith both seem to insist that the conductor's words were spoken as he was in the act of passing out the west door,—a fact inconsistent with the evidence as to the conversation with Stein, which, from the conductor's testimony, would seem to have occurred near the east door. Serious doubts having arisen, the evidence has been carefully re-examined; and we now are of the opinion that the testimony offered by the plaintiff in no wise conflicts with that offered by the defendant, to the effect that Stein heard the conductor's warning, and thanked him for the information. While the language of Smith especially would in-

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dicade that the conductor gave the warning as he was passing out of the front end of the car, and immediately before he went out, on cross-examination he says, not that the conductor was at or near the west door, but that he was nearer the west door than the center of the car; but he also says that he was only a few steps from Smith. Kelley was between Smith and the west end of the car. So that his testimony in this respect is not materially different from that of the conductor and the other passengers, who say that the conductor was about in the center of the car when he spoke. Now, Smith says that Stein had been on the north side of the car, and east of Smith, which would place three men on the north bench. Smith does not seem to have observed Stein at all after this stop was made. Johnson says that, when he awoke, there were only two men on the north bench and these were Smith and Kelley. Therefore, Stein must have arisen from the north bench before Smith and Johnson awoke; and he must have been standing towards the east end of the car, or the other witnesses, who observed the conductor a little west of them, would have seen Stein also. Moreover, Johnson saw Stein go out the east door. The probabilities are that this movement would have been noticed by some of the other passengers if he had not been already near the east door, and away from his seat, when the others were awakened. Another fact is that Johnson and Smith both testify that they were asleep when the train stopped; and Smith's testimony is positive that it was the conductor's voice, and not the stopping of the train, which awakened him. This would seem to be true, also, of Johnson, because, as he awakened, he saw the conductor west of him. The conductor had, then, descended from the cupola, and passed westward, before Johnson awoke. It is not unnatural that these two witnesses should not have observed or recalled such an incident as Stein's thanking the conductor for the warning, when it must have occurred as they were awakening from sleep. Finally, neither Smith nor Johnson was asked whether the incident with Stein did occur. If their testimony could be taken as denying its occurrence, it would be merely by inference, from their relating what did occur, omitting this incident. They testified in chief before the conductor had testified or Kelley's deposition was read. Their attention was in no wise called to this conversation, and the case is in that respect far different from what it would have been if their attention had been

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directly called to it, and if they had denied its occurrence. We think, therefore, that the testimony, without contradiction, shows, not only that the conductor gave the warning, but that it was understood by Stein; and if so, we think his act, in attempting to leave the car in the face of such warning, was so clearly and so grossly negligent as to permit no other reasonable inference to be drawn. Reversed and remanded.

OMAHA & R. V. R. Co.

v.

KRAYENBUHL.

(*Supreme Court of Nebraska, May 19, 1896.*)

Rate of Speed not Negligence per se.—In the operation of a railway train outside of towns and villages no rate of speed, however great, is alone sufficient evidence to establish negligence.

Fellow Servants.—The foreman of a section crew and the engineer in charge of a locomotive drawing a train not connected with the work of the section men, are not fellow servants within the meaning of the rule forbidding recovery for injuries caused by the negligence of a fellow servant.

Credibility of Witness.—The maxim "*Falsus in uno, falsus in omnibus*" applies only where a witness had knowingly and wilfully testified falsely as to a matter of fact.

Instruction to Jury.—It is error to instruct a jury that it may consider whether or not statutory highway signals were given by an approaching train in determining whether the train was in other respects negligently operated.

Contributory Negligence.—A section man cannot be charged with contributory negligence because he remained upon the track for the purpose of removing an obstruction endangering an approaching train, when he might have saved himself by abandoning the track, and leaving the train to its fate.

ERROR to Butler county district court. *Reversed.*

John M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.

E. R. Dean, A. J. Evans, and E. W. Hale, for defendant in error.

Omaha & R. V. R. Co. v. Krayenbuhl

IRVINE, C.—This was an action brought under chapter 21, Comp. St., by Ida L. Krayenbuhl, as administratrix of the estate of John Krayenbuhl, deceased, against the
Case stated. Omaha & Republican Valley Railroad Company, to recover on account of injuries resulting in the death of said decedent. There is no necessity of reviewing the whole case in detail, because many questions presented in the district court have since the trial there been decided by this court in other cases. A brief statement of the evidence is, however, essential to a consideration of the questions which we deem it necessary to pass upon.

John Krayenbuhl, the deceased, was a section foreman in the employ of the railway company. During the forenoon of the 18th day of January, 1892, he was proceeding westward along the track of the railway company on a hand car, carrying a railway rail, and accompanied by one man under his direction and control. Snow was falling, and a wind prevailed. The depth of snow and the velocity and direction of the wind are matters concerning which the evidence is conflicting, but these facts are not very material to the questions of law presented. The track, after pursuing a straight course to the westward for some distance, crossed a highway, and soon thereafter curved to the south, following in a general way the meanderings of a stream. In its course it passed through some cuts. Krayenbuhl and his companion, Martin, upon entering these cuts, found that the track was obstructed by snow. Krayenbuhl sent Martin back towards the east, with a flag, to warn approaching trains, and proceeded to shovel snow from the track ahead of the hand car, pushing the hand car on as he progressed. When Martin, carrying the flag, had gone something over a hundred yards east of the hand car, a train, consisting of a locomotive and way car, running at a speed estimated by different witnesses at from 18 to 45 miles per hour, approached from the east. Martin signaled the train to stop, and Krayenbuhl, evidently on hearing the train approach, removed the rail from the hand car, and was in the act of removing the hand car from the track, when the train struck him, breaking his neck, and killing him. The negligence alleged was in running the train at a dangerous rate of speed, in failing to give warning of its approach, and in disregarding the signal given by Martin. There are some other allegations of negligence, but proof in support thereof was

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excluded by the district court, and these it is not necessary to state. The point where the accident occurred was not within any town or city, and it has been repeatedly held that no rate of speed is of itself negligence under such circumstances. Railroad Co. v. Wendt, 12 Neb. 76; Railroad Co. v. Grablin, 38 Neb. 90; Railroad Co. v. Hansen, 48 Neb. —, 66 N. W. 1105. The foundation of the action must therefore be in failing to give signals of the approach of the train, and in the alleged failure to obey the signal of Martin to stop. A question much argued is as to whether the deceased and the engineer in charge of the train were fellow servants. If they were so, as a matter of law a summary disposition of the case might be made. But the rules announced in Railroad Co. v. Erickson, 41 Neb. 1, are applicable to this case, and determine the question adversely to the contention of the railway company. We are therefore required to consider the case more with regard to details than the principal arguments of the railway company, if well founded, would require.

Rate of speed
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vants.

There is a conflict in the evidence as to whether the statutory signals were given of the approach of the train to the highway east of the point where the accident occurred. Several witnesses testifying on behalf of the plaintiff say that they heard no such signals. The engineer and conductor both testify, however, that the statutory signal was given. The court instructed the jury, in effect, that the highway signals were for the benefit of persons traveling upon the highway, and that the failure to give them would not tend to charge the railway company in this case. In view of the decision, rendered since the trial, in Railroad Co. v. Metcalf, 44 Neb. 849, these instructions were too broad; but the error was prejudicial to the plaintiff, rather than to the railway company. But the court followed these instructions by the following: "However, if you find from the evidence that the law governing railway trains on their approaching highway crossings was not complied with in this case, and that the whistle was not blown or the bell rung on the train in question approaching Foxe's crossing, then such fact should be considered by you as affecting or touching the credibility of the witnesses for the defendant who testified on this point, and also in considering by you whether or not said train was being run

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and operated in a careful and proper manner or otherwise." This instruction was prejudicially erroneous as to the railway company in two respects. In the first place, it was a distinct direction to the jury to consider whether or not the signals had been given, as affecting the general credibility of the witnesses for the defendant who testified on this point. Both engineer and conductor had testified that the signals were given. The engineer testified that it was a stormy day, with a strong wind, while other witnesses testified that it was reasonably clear, and the wind not strong. The engineer testified that the engine was covered with snow; that snow was banked up against the front windows of the cab, and that the only lookout that he could maintain was through a side window; that in keeping such lookout his face had been frozen; that the train passed from time to time through snowbanks which completely obstructed his view, and compelled him to withdraw his head; that he had passed through such a snowbank immediately before seeing Martin with the flag; that he saw Martin when the latter was not more than 30 feet from him, and immediately took all available steps to stop the train. Witnesses for the plaintiff had testified that no attention whatever was paid to Martin's signal, and that the train proceeded without apparent check until the accident occurred. The effect of giving the instruction complained of was that the jury should examine into the question whether a signal had been given on approaching Foxe's crossing, and upon that fact determine the engineer's credibility upon all other facts in the case; and this without regard to whether the engineer's testimony as to having given the signal was willfully false or otherwise. The maxim, "*Falsus in uno, falsus in omnibus*," applies only where a witness has knowingly and willfully testified falsely as to a matter of fact.

Credibility of witness. Buffalo Co. v. Van Sickle, 16 Neb. 363; Stoppert v. Nierle, 45 Neb. 105. In the second place, the instruction was erroneous because by its last clause it directed the jury that they should consider whether or not the highway signal had been given, as determining whether or not the train was generally run and operated in a careful manner. As already indicated, under the circumstances the failure to give the highway signal may have been important in determining whether the railroad company's negligence in not giving it caused the injury. But it could have no possible

effect in determining whether or not the railroad company had been negligent in other respects. The jury would have no right to infer a negligent operation of the train in other particulars from a failure to give this signal. **Instructions.** But the instruction was that it might do so. For the error in this instruction the judgment must be reversed.

We cannot, however, let the case rest here without disposing of another question which is likely to arise upon a new trial. The railroad company, by its offers of evidence, and by tendering instructions, contended **Contributory negligence.** that, if Krayenbuhl could have saved his life by abandoning the car upon the track and stepping aside, he was compelled to do so, by virtue of rules of the company and general principles of contributory negligence. Instructions to this effect were refused, and their refusal is assigned as error. The court was undoubtedly right in refusing these instructions. To have given them would have been contrary to law, and would have countenanced a contention closely bordering upon brutality. A hand car with a railroad rail upon it, when struck by a rapidly moving train, might have caused a wreck costing the lives of many people. Krayenbuhl did right in remaining upon the track, after he heard the train approaching, for the purpose of removing the rail, and afterwards the car, if possible. Such conduct was not negligence; it was heroism. No law could be announced which would tend to deter railway employees from acts of such a character, and, so far as this court is concerned, no such law will be announced. Reversed and remanded.

NOTES

Fellow Servant—Foreman.—In *Elliot v. Chicago, etc., R. Co.*, 5 Dakota 523, it was held that a section foreman and a train conductor were co-employees within the purview of Civil Code Dak., exempting an employer from liability to one of his servants for the negligence of another servant engaged in the same general business.

The foreman of a crew of wreckers who boards a train for a place on the road where a wreck has occurred is a fellow servant of the engineer of the train and colliding train, although not in the service at the time, but only on his way home. He cannot, therefore, recover for an injury caused by the negligence of either of such engineers. *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 202, 17 Am. & Eng. R. Cas. 614.

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HENNINGTON

v.

GEORGIA.

(163 U. S. 299.)

Running of Freight Trains on Sunday.—To prohibit by state statute the running of freight trains on Sunday is a legitimate exercise of the police power, and not an interference with interstate commerce, though it prevents the passage of trains to and from other states.

IN error to the supreme court of Georgia. *Affirmed.*

Edward Colston, for plaintiff in error.

J. M. Terrell, for defendant in error.

Mr. Justice HARLAN delivered the opinion of the court.

The plaintiff in error, Hennington, superintendent of transportation and having charge of the freight business of the

Case stated. Alabama Great Southern Railroad Company, was indicted, in the superior court of Dade county, Ga., for the offense of having, on the 15th day of March, 1891,—that being the Sabbath day,—unlawfully run a freight train on the Alabama Great Southern Railroad in that county.

The statute under which the prosecution was instituted is as follows:

“ Sec. 4578. If any freight train shall be run on any railroad in this state on the Sabbath day (known as Sunday), the superintendent of transportation of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable for indictment for a misdemeanor in each county through which such train shall pass, and, on conviction, shall be for each offense punished as prescribed in section 4310 of this Code. On such trial it shall not be necessary to allege or prove the names of any of the employees engaged on such train, but the simple fact of the train being run. The defendant may justify himself by proof that such employees acted in direct violation of the orders and rules of the defendant: Provided, always, that whenever any

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train on any railroad in this state, having in such train one or more cars loaded with live stock, which train shall be delayed beyond schedule time, shall not be required to lay over on the line of road or route during Sunday, but may run on to the point where, by due course of shipment or consignment, the next stock pen on the route may be, where said animals may be fed and watered, according to the facilities usually afforded for such transportation. And it shall be lawful for all freight trains on the different railroads in this state, running over said roads on Saturday night, to run through to destination: Provided the time of arrival, according to the schedule by which the train or trains started on the trip, shall not be later than eight o'clock on Sunday morning." Code Ga., 1882.

Section 4310, referred to in the section just quoted, is as follows:

"Accessories after the fact, except where it is otherwise ordered in this Code, shall be punished by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chain-gang on the public works, or on such other works as the county authorities may employ the chain-gang, not to exceed twelve months, and any one or more of these punishments may be ordered in the discretion of the judge: Provided, that nothing herein contained shall authorize the giving the control of convicts to private persons, or their employment by the county authorities in such mechanical pursuits as will bring the products of their labor into competition with the products of free labor." Code Ga. 1882.

The defendant pleaded not guilty. He also pleaded specially certain facts which, he averred, showed that the statute of Georgia, as applied to this case, was in conflict with the provision of the constitution of the United States giving congress power to regulate commerce among the states.

At the trial the defendant admitted that he was superintendent of transportation of the Alabama Great Southern Railroad, the property of the Alabama Great Southern Railroad Company, a corporation of Alabama; that the line of that railroad began at the city of Chattanooga, Tenn., extended 9 miles through that state, when it entered the county of Dade, Ga., and ran through that county and over the line of road constructed and operated originally by the Wills Valley

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Railroad Company, into Alabama; thence through Alabama 245 miles, and into Mississippi, to the city of Meridian, where it connected with other roads; that said company was acting as a common carrier of passengers and freight along its line, using engines and cars propelled by steam; that, on the day mentioned in the indictment, the company, by its superintendent of transportation, the defendant, ran over its line of road from Chattanooga, Tenn., through Georgia and Alabama to Meridian, Miss., a train of cars laden with freight for points beyond the limits of Georgia, the train having been loaded in Tennessee with freight destined for points outside and beyond the limits of Georgia.

The defendant contended that the statute, if applied to these facts, was repugnant to the constitution of the United States. This contention was overruled, and the jury were instructed that, under the facts admitted, the defendant was guilty. The jury accordingly found him guilty as charged in the indictment.

The case was taken to the supreme court of Georgia, and it was assigned for error that the trial court refused to adjudge section 4578 of the Code of Georgia, when applied to the admitted facts, to be repugnant to the commerce clause of the constitution.

The supreme court of Georgia held the statute under which the prosecution was instituted to be a regulation of internal police, and not a regulation of commerce; that it was not in conflict with the constitution of the United States, even as to freight trains passing through the state from and to adjacent states, and laden exclusively with freight received on board before the trains entered Georgia and consigned to points beyond its limits.

As the judgment of the supreme court of Georgia denied to the defendant a right of immunity specially set up and claimed by him under the constitution of the United States, no question is or can be made as to the jurisdiction of this court to review that judgment.

If the statute in question, forbidding the running in Georgia of railroad freight trains on the Sabbath day, had been expressly limited to trains laden with domestic freight, it could not be regarded otherwise than as an ordinary police regulation, established by the state under its general power to pro-

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protect the health and morals, and to promote the welfare, of its people.

From the earliest period in the history of Georgia it has been the policy of that state, as it was the policy of many of the original states, to prohibit all persons, under penalties, from using the Sabbath as a day for labor and for pursuing their ordinary callings. By an act of the colonial legislature of Georgia, approved March 4, 1762, it was provided: "No tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business or work of their ordinary callings, upon the Lord's day, or any part thereof (works of necessity or charity only excepted), and that every person being of the age of fifteen years or upwards, offending in the premises, shall, for every such offense, forfeit the sum of ten shillings. And that no person or persons whatsoever shall publicly cry, show forth, or expose to sale, any wares, merchandise, fruit, herbs, goods, or chattels whatsoever upon the Lord's day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried or showed forth, or exposed to sale, or pay ten shillings." 2 Cobb's Dig. Laws Ga. (New), p. 853. This act is substantially preserved in section 4579 of the Code of Georgia. And by an act approved February 11, 1850, it was provided "that from and after the 1st day of March next it shall not be lawful for any company or individual to run any freight train or any car carrying freight upon any railroad now existing, or that may hereafter be made, in this state, on the Sabbath day; and any conductor or other person so running or assisting in running any train or car carrying freight on the Sabbath day shall each be guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding five hundred dollars." 1 Cobb's Dig. Laws Ga. (New), p. 399. This act was amended by substituting "superintendent of transportation" for "conductor," and in other particulars, not important to be mentioned, and as amended it constitutes section 4578 of the Criminal Code, under the heading of "Offenses against Public Morality, Health, Police," etc. Code Ga. 1882.

In what light is the statute of Georgia to be regarded? The well-settled rule is that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those

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objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution. *Mugler v. State of Kansas*, 123 U. S. 623, 661, 8 Sup. Ct. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 10 Sup. Ct. 862.

In our opinion, there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the state. It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness, and health of the people, it was within its discretion to fix the day when all labor, within the limits of the state, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor. The fundamental law of the state committed these matters to the determination of the legislature. If the law-making power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, federal and state, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature. The legislature of Georgia no doubt acted upon the view that the keeping of one day in seven for rest and relaxation was "of admirable service to a state considered merely as a civil institution." 4 Bl. Comm. *63. The same view was expressed by Mr. Justice FIELD in *Ex parte Newman*, 9 Cal. 502, 520, 529, when, referring to a statute of California relating to the Sabbath day, he said: "Its requirement is a cessation of labor. In its enactment, the legislature has given the sanction of law to a rule of conduct which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of

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opinion, among philosophers, moralists, and statesmen of all nations, as on the necessity of periodical cessation of labor. One day in seven is the rule, founded in experience and sustained by science. * * * The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society is promoted."

So, in *Bloom v. Richards*, 2 Ohio St. 387, 392, Judge THURMAN, delivering the unanimous judgment of the supreme court of Ohio, said: "We are, then, to regard the statute under consideration as a mere municipal or police regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath day. Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require the cessation of labor, and to name the day of rest."

To the same general effect are many cases: *Specht v. Com.*, 8 Pa. St. 312, 322; *Com. v. Has*, 122 Mass. 40, 42; *Frolickstein v. Mobile*, 40 Ala. 725; *Ex parte Andrews*, 18 Cal. 678, in which the dissenting opinion of Mr. Justice FIELD in *Ex parte Newman*, 9 Cal. 502, was approved; *State v. Railroad*, 24 W. Va. 783; *Scales v. State*, 47 Ark. 476, 482, 1 S. W. 769; *State v. Ambs*, 20 Mo. 214; *Mayor, etc., v. Luick*, 12 Lea 499, 515.

The same principles were announced by the supreme court of Georgia in the present case. As the contention is that that court erred in not adjudging the statute in question to be unconstitutional, it is appropriate that the grounds upon which it proceeded should fully appear in this opinion. That court, speaking by Chief Justice BLECKLEY, said: "There can be no well-founded doubt of its being a police regulation, considering it merely as ordaining the cessation of ordinary labor and business during one day in every week; for the frequent and total suspension of the toils, care, and strain of mind or muscle incident to pursuing an occupation or common employment, is beneficial to every individual, and incidentally to the community at large, the general public. Leisure is no less essential than labor to the well-being of man. Short intervals of leisure at stated periods reduce wear and tear,

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promote health, favor cleanliness, encourage social intercourse, afford opportunity for introspection and retrospection, and tend in a high degree to expand the thoughts and sympathies of people, enlarge their information, and elevate their morals. They learn how to be, and come to realize that being is quite as important as doing. Without frequent leisure, the process of forming character could only be begun. It could never advance or be completed. People would be mere machines of labor or business,—nothing more. If a law which, in essential respects, betters for all the people the conditions, sanitary, social, and individual, under which their daily life is carried on, and which contributes to insure for each, even against his own will, his minimum allowance of leisure, cannot be rightfully classed as a police regulation, it would be difficult to imagine any law that could."

That court further said: "With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not that they did have; and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest. But neither of these considerations is destructive of the police nature and character of the statute. If good and sufficient police reasons underlie it, and substantial police purposes are involved in its provisions, these reasons and purposes constitute its civil and legal justification, whether they were or not the direct and immediate motives which induced its passage, and have for so long a time kept it in force. Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influence them in enacting laws which are within legislative competency. That which is properly made a civil duty by statute is none the less so because it is also a real or supposed religious obligation; nor is the statute vitiated, or in any wise weakened, by the chance, or even the certainty, that, in passing it, the legislative mind was swayed by the religious, rather than by the civil, aspect of the measure. Doubtless it is a religious duty to pay debts, but no one supposes that this is any obstacle to its being exacted as a civil duty. With few exceptions, the same may be said of the whole catalogue of duties specified in the Ten Commandments. Those of them which are purely

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and exclusively religious in their nature cannot be made civil duties, but all the rest of them may be, in so far as they involve conduct, as distinguished from mere operations of mind or states of the affections. Opinions may differ, and they really do differ, as to whether abstaining from labor on Sunday is a religious duty; but whether it is or is not, it is certain that the legislature of Georgia has prescribed it as a civil duty. The statute can fairly and rationally be treated as a legitimate police regulation, and, thus treated, it is a valid law. There is a wide difference between keeping a day holy as a religious observance, and merely forbearing to labor on that day in one's ordinary vocation or business pursuit." *Hennington v. State*, 90 Ga. 396-399.

Assuming, then, that, both upon principle and authority, the statute of Georgia is, in every substantial sense, a police regulation, established under the general authority possessed by the legislature to provide, by laws, for the well-being of the people, we proceed to consider whether it is in conflict with the constitution of the United States.

The defendant contends that the running on the Sabbath day of railroad cars, laden with interstate freight, is committed exclusively to the control and supervision of the national government; and that, although congress has not taken any affirmative action upon the subject, state legislation interrupting, even for a limited time only, interstate commerce, whatever may be its object, and however essential such legislation may be for the comfort, peace, and safety of the people of the state, is a regulation of interstate commerce forbidden by the constitution of the United States. Is this view of the constitution and of the relations between the states and the general government sustained by the former decisions of this court? Is the admitted general power of a state to provide by legislation for the health, the morals, and the general welfare of its people so fettered that it may not enact any law whatever that relates to or affects in any degree the conduct of commerce among the states? If the people of a state deem it necessary to their peace, comfort, and happiness, to say nothing of the public health and the public morals, that one day in each week be set apart by law as a day when business of all kinds carried on within the limits of that state shall cease, whereby all persons of every race and condition in life may have an opportunity to enjoy absolute

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rest and quiet, is that result, so far as interstate freight traffic is concerned, attainable only through an affirmative act of congress giving its assent to such legislation ?

The argument in behalf of the defendants rests upon the erroneous assumption that the statute of Georgia is such a regulation of interstate commerce as is forbidden by the constitution, without reference to affirmative action by congress, and not merely a statute enacted by the state under its police power, and which, although in some degree affecting interstate commerce, does not go beyond the necessities of the case, and therefore is valid, at least until congress interferes.

The distinction here suggested is not new in our jurisprudence. It has been often recognized and enforced by this court. In *Gibbons v. Ogden*, 9 Wheat. 1, 203, 210, this court recognized the possession by each state of a general power of legislation, that "embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves." Inspection laws, although having, as the court said in that case, "a remote and considerable influence on commerce," are yet within the authority of the states to enact, because no direct, general power over the objects of such laws was granted to congress. So, also, quarantine laws of every description, if they have real relation to the objects named in them, are to be referred to the power which the states have to make provision for the health and safety of their people. But neither inspection, quarantine, nor health laws enacted by a state have been adjudged void, by force alone of the constitution; and, in the absence of congressional legislation, simply because they remotely, or even directly, affected or temporarily suspended commerce among the states and with foreign nations. Of course, if the inspection, quarantine, or health laws of a state, passed under its reserved power to provide for the health, comfort, and safety of its people, comes into conflict with an act of congress, passed under its power to regulate interstate and foreign commerce, such local regulations, to the extent of the conflict, must give way, in order that the supreme law of the land—an act of congress passed in pursuance of the constitution—may have unobstructed operation. The possibility of conflict between state and national enactments, each to be referred to the undoubted powers of the state and the nation, respec-

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tively, was not overlooked in *Gibbons v. Ogden*, and Chief Justice MARSHALL said: "The framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislatures as do not transcend these powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

These principles are illustrated in numerous decisions of this court, to some of which it is proper to refer.

In *Wilson v. Marsh Co.*, 2 Pet. 245, 251, 252, it appeared that that company claimed the right, under a statute of Delaware, to place a dam across a navigable creek, up which the tide flowed for some distance, and thereby abridge the rights of those accustomed to use the stream. This court, after observing that the construction of the dam would enhance the value of the adjoining land, and probably improve the health of the inhabitants, and that such an abridgment of private rights, unless it came in contact with the constitution or a law of the United States, was an affair between the government of Delaware and its citizens, of which this court could not take cognizance, said: "The counsel for plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several states.' If congress had passed any act which bore upon the case,—any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern states,—we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to

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regulate commerce with foreign nations and among the several states,—a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.” Notwithstanding that case has been sometimes criticised, its authority has never been questioned in this court. On the contrary, it was declared in *Pound v. Turck*, 95 U. S. 459, 463, that it had never been overruled, but had always been sustained.

In *Gilman v. Philadelphia*, 3 Wall. 713, 729, the question was as to the validity of an act of the legislature of Pennsylvania, authorizing the construction of a bridge over the Schuylkill, “an ancient river and common highway of the state.” It appeared that the bridge, if constructed, would prevent the passage up the river of vessels having masts, interfere with commerce, and materially injure the value of certain wharf and dock property on the river. Congress had not passed any act on the subject, but the contention was that such an interference with commerce on a public navigable water was inconsistent with the constitution of the United States. The court said: “It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases to the paramount authority of congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation.”

In *Cooley v. Board*, 12 How. 299, 320, it was adjudged that the mere grant to congress of the power to regulate commerce did not deprive the states of power to regulate pilots on the public navigable waters of the United States.

In *Owners of Brig James Gray v. Owners of Ship John*

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Fraser, 21 How. 184, 187, the court held to be valid two ordinances of the city of Charleston,—one providing that no vessel should be in the harbor of that city for more than 24 hours, and inflicting certain penalties for every disobedience of the ordinance; the other requiring all vessels anchored in the harbor to keep a light burning on board from dark until daylight, suspended conspicuously amidships, 20 feet high from the deck. The court said: “The power of the city authorities to pass and enforce these two ordinances is disputed by the libellants. But regulations of this kind are necessary and indispensable in every commercial port for the convenience and safety of commerce. And the local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there; where she may unload or take on board particular cargoes; where she may anchor in the harbor, and for what time; and what description of light she shall display at night, to warn the passing vessels of her position, and that she is at anchor, and not under sail. They are like to the local usages of navigation in different ports, and every vessel, from whatever part of the world she may come, is bound to take notice of them, and conform to them. And there is nothing in the regulations referred to in the port of Charleston which is in conflict with any law of congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States.”

In *Railroad Co. v. Fuller*, 17 Wall. 560, 567, 570, the question was as to the validity of a statute of Iowa requiring that each railroad company should, in the month of September, annually, fix its rates for the transportation of passengers and of freights of different kinds; that it should put up a printed copy of such rates at all its stations and depots, and cause a copy to remain posted during the year; and that a failure to fulfill these requirements, or the charging of a higher rate than was posted, should subject the offending company to the payment of the penalty prescribed. The court said: “In all other respects there is no interference. No other restraint is imposed. Except in these particulars, the company may exercise all its faculties as it shall deem proper. No discrimination is made between local and interstate freights, and no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed, made public, and honestly adhered to. In this there is noth-

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ing unreasonable or onerous. The public welfare is promoted, without wrong or injury to the company. The statute was doubtless deemed to be called for by the interests of the community to be affected by it, and rests upon a solid foundation of reason and justice. It is not, in the sense of the constitution, in anywise a regulation of commerce." Again: "If the requirements of the statute here in question were, as contended by the counsel for the plaintiff in error, regulations of commerce, the question would arise whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until superseded by the paramount action of congress. But, as we are unanimously of opinion that they are merely police regulations, it is unnecessary to pursue the subject."

In *Railroad Co. v. Husen*, 95 U. S. 465, 470-473, the court, while holding to be invalid, under the constitution of the United States, a statute of Missouri, which met at the borders of the state a large and common subject of commerce, and prohibited it crossing the line during two-thirds of each year, except subject to onerous conditions, which obstructed interstate commerce, and worked a discrimination between the property of citizens of one state and that of citizens of other states, said that "the deposit in congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power"; that that power extended "to making regulations of domestic order, morals, health, and safety," but could not be exercised over a subject confided exclusively in congress, nor invade the domain of the national government, nor by any law of a police nature interfere with transportation into or through the state, "beyond what is absolutely necessary for its self-protection." The court, in that case, concluded with these words: "The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the constitution. And as its range sometimes comes very near to the field committed by the constitution to congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

A leading case upon the subject is that of *Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Board of Health*,

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118 U. S. 455, 463-465, 6 Sup. Ct. 1114, which related to certain quarantine laws of Louisiana, the validity of which was questioned, partly upon the ground that they were inconsistent with the power of congress to regulate commerce among the states. This court said: "Is the law under consideration void as a regulation of commerce? Undoubtedly it is in some sense a regulation of commerce. It arrests a vessel on a voyage, which may have been a long one. It may affect commerce among the states when the vessel is coming from some other state of the Union than Louisiana, and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers. In so far as it provides a rule by which this power is exercised, it cannot be denied that it regulates commerce. We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the states as exclusively their own, and therefore not ceded to congress. For, while it may be a police power, in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of federal authority as defined by the constitution, the latter must prevail. *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Henderson v. Mayor, etc.*, 92 U. S. 259, 272; *New Orleans Gas-Light Co. v. Louisiana Light, etc., Co.*, 115 U. S. 650, 661. But it may be conceded that, whenever congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the state on the subject are valid." Again: "Quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of congress."

Upon the subject of legislation enacted under the police

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power of a state, and which, although affecting more or less commerce among the states, was adjudged to be valid, until displaced by some act of congress, the case of *Smith v. Alabama*, 124 U. S. 465, 474, 479, 482, 33 Am. & Eng. R. Cas. 425, is instructive. A statute of Alabama made it unlawful for an engineer on a railroad train in that state to operate an engine upon the main line of the road used for the transportation of passengers or freight, without first undergoing an examination and obtaining a license from a state board of examiners. The point was made that the statute, in its application to engineers on interstate trains, was a regulation of commerce among the states, and repugnant to the constitution. This court referred to and reaffirmed the principle announced in *Sherlock v. Alling*, 93 U. S. 99, 102, where it was said: "In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution." Referring to the fact that congress had prescribed the qualification for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States, while engaged in commerce among the states, the court, in *Smith v. Alabama*, said that the power of congress "might, with equal authority, be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the states, and in that case would supersede any conflicting provisions on the same subject made by local authority. But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of the local laws which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of congress in the exercise of its power over commerce, and which, until so displaced, according to

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the evident intention of congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the state or in commerce among the states. No objection to the statute, as an impediment on the free transaction of commerce among the states, can be found in any of its special provisions." Again: "We find, therefore, first that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the state to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of persons and property; and, thirdly, that, so far as it affects transactions of commerce among the states, it does so indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of congress on the subject, nor contrary to any intention of congress to be presumed from its silence."

So, in *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 99, 101, 38 Am. & Eng. R. Cas. 1, which involved the validity of a state enactment which, for the protection of the traveling public, declared any one disqualified from serving on railroad lines within the state who had color blindness and defective vision, and which statute was equally applicable to domestic and interstate railroad trains, the court said: "It is conceded that the power of congress to regulate interstate commerce is plenary; that, as incident to it, congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject." But, until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of state and federal courts that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the states, but it is among their plain duties, to make pro-

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vision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as practicable." Referring to some observations made in *Smith v. Alabama*, *supra*, the court said: "The same observations may be made with respect to the provisions of the state law for the examination of parties to be employed on railways with respect to their powers of vision. Such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the constitution, a regulation of commerce."

These authorities make it clear that the legislative enactments of the states passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to congress to regulate such commerce, and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of congress passed in execution of the power granted to it by the constitution. Local laws of the character mentioned have their source in the powers which the states reserved, and never surrendered to congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the constitution, and considered in their own nature, regulations of interstate commerce, simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight. And it places the business of transporting freight in the same category as all other secular business. It simply declares that, on and during the day fixed by law as a day of rest for all the people within the limits of the state from toil and labor incident to their callings, the transportation of freight shall be suspended.

We are of opinion that such a law, although in a limited

degree affecting interstate commerce, is not, for that reason, a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation, designed to secure the well-being and to promote the general welfare of the people within the state by which it was established, and, therefore, not invalid by force, alone, of the constitution of the United States.

Interference
of police regu-
lation with
interstate
commerce.

The judgment is affirmed.

The CHIEF JUSTICE, with whom concurred Mr. Justice WHITE, dissenting.

Intercourse and trade between the states by means of railroads passing through several states, is a matter national in its character, and admitting of uniform regulation. The power of congress to regulate it is exclusive, and under the constitution it is free and untrammelled except as congress otherwise provides. This statute, in requiring the suspension of interstate commerce for one day in the week, amounts to a regulation of that commerce, and is invalid, because the power of congress in that regard is exclusive. But it is said that the act is not a regulation of commerce, but a mere regulation of police, and that the so-called police power of a state is plenary. The result, however, is the same. When a power of a state and a power of the general government come into collision, the former must give way; and, as the freedom of interstate commerce is secured by the constitution, except as congress shall limit it, the act is void, because in violation of that freedom.

NOTES

Sunday Laws—Interference with Interstate Commerce.—While there is no doubt that the state may control the operation of railroads running only within its limits (Louisville, etc., R. Co. v. State, 66 Miss. 662, affirmed 133 U. S. 589, 41 Am. & Eng. R. Cas. 36, 19 Am. & Eng. Enc. of Law, p. 884), there had been, until the decision of the principal case, some conflict as to whether a statute prohibiting the running of all trains within the state is constitutional.

In State v. Baltimore, etc., R. Co., 24 W. Va. 783, 18 Am. & Eng. R. Cas. 466, a state law forbidding the running of trains on Sunday within the state was held constitutional, even as applied to railroads engaged in transportation through several states. GREEN, J., said: "It (the statute) was passed for the sole purpose of promoting the

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mental, moral, and physical well-being of our people by providing that they should rest a seventh part of their time from labor of every description, and that this rest should be at regular intervals. The legislature had no sort of purpose in doing so to regulate in any way interstate commerce. It does not propose to trammel, hinder, or shackle commerce. * * * It was intended for and is only an internal policy law; and though it may have some incidental effect upon the interstate commerce of the defendant, that fact, according to all the authorities, does not make such a law unconstitutional as regulating interstate commerce; for it does not regulate it in the constitutional sense of the word." See also *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362.

If such statutes are to be upheld, it is on the ground that, though they affect interstate commerce, it is merely incidentally, and not to such an extent as to amount to a "regulation" of it. See 11 Am. & Eng. Enc. of Law, p. 556; *Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 1.

The Virginia court takes a view directly opposed to that of the West Virginia court. In *Norfolk, etc., R. Co. v. Com.*, 88 Va. 95, it was held that sec. 3801 of the Virginia Code of 1887, prohibiting the running of all trains on Sunday, except those exclusively for the relief of wrecked or disabled trains, or for the transportation of passengers, live stock, or articles of such a perishable nature as would be necessarily impaired in value by one day's delay, was void, in so far as it applied to trains running between points in different states. In both the leading cases just mentioned, the opinions discuss the question at length and review the authorities.

LUNDQUIST

v.

DULUTH ST. R. CO.

(Supreme Court of Minnesota, July 3, 1896.)

Fellow Servants.—The defendant, a street railway company, required by its rules that its employees in charge of its cars should give timely warning, by proper signals, to its employees engaged in track repairing, of the approach of its cars. The plaintiff in reliance on such rules, and while at work repairing the track of the defendant, as its employee, was struck and injured by a car, by the failure of the motorman to give such signals, and by his running the car at a rate of speed prohibited by law. *Held*, that the plaintiff and the motorman were fellow-servants, and that the defendant is not liable to the plaintiff for his injuries resulting from the negligence of the motorman.

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APPEAL from St. Louis county district court. *Affirmed.*

John Jenswold, Jr., for appellant.

Billson, Congdon & Dickinson, for respondent.

START, C. J.—The defendant is a street-railway corporation, and operates, with others, a double-track street-railway line upon Superior street, in the city of Duluth.

On July 10, 1894, the plaintiff, while at work as the servant of the defendant repairing its tracks on such street, was struck and injured by one of its cars which was then being operated along its tracks. He brought this action to recover damages for such injury, alleging in his complaint that it was due to the defendant's negligence. At the trial, the defendant, upon the pleadings and certain admissions made by the plaintiff, moved the court to dismiss the case, on the ground that the negligence of which plaintiff complained was that of the motorman, his fellow servant. The motion was granted, and plaintiff appealed from an order denying his motion for a new trial. Case stated.

The short facts of the case, as disclosed by the complaint and the admissions at the trial, are these: The plaintiff was one of a crew of men employed by the defendant, who were engaged in repairing the tracks, by taking up and relaying the pavement between the rails over which the defendant's street cars operated by electric power passed frequently at irregular intervals. In order to make the place a reasonably safe one for the men thus employed, the defendant adopted a rule whereby it required those in charge of its cars to give timely warning of their approach to the crew, and it was the custom to so do. The plaintiff pursued his work in reliance upon this rule and custom and a due observance of them by the defendant, and while so engaged, and without notice of the approach of the car which struck him, this car approached the place where the plaintiff was at work at the rate of 10 miles an hour, and the motorman in charge thereof failed to make any effort to slacken its speed, and negligently failed to give any signal or warning of its approach. The charter of the defendant provides that no car shall be run within the limits of the city at a greater rate of speed than six miles an hour. The principal question presented by these facts for our decision is whether the negligence of the motorman was that of a fellow servant or a vice principal

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The provisions of chapter 13, Laws 1887, modifying the law as to injuries sustained by one servant by the negligence of his fellow servant in cases of railway companies, have no application to the defendant street-railway company. *Funk v. Railway Co.*, (Minn.) 63 N. W. 1099. Counsel for the plaintiff claims that it was the defendant's duty to furnish to plaintiff a reasonably safe place in which to work, and, as a means of making the place in question safe, it was necessary to give him due warning of the approach of its cars, and, having made a rule requiring the motorman to give such warning, his failure to do so was the negligence of the defendant, and not of a fellow servant. He supports his contention with ability and the citation of adjudged cases in other jurisdictions; but, whatever may be the rule elsewhere, we must hold

Fellow servants. that the negligence of the motorman was that of a fellow servant, as we regard the question settled by the previous decisions of this court. It is true, as claimed, that it was the duty of the defendant to use reasonable care to provide a safe place in which the plaintiff was required to work, and that this duty, like the duty to furnish safe machinery and proper appliances for doing the work, was an absolute one, which the defendant could not delegate, so as to be relieved from liability in case the duty was neglected. But if the safe place or safe machinery which the master has furnished and keeps in repair is made unsafe by the negligence of his servants, whom he has selected with due care, in using or operating the place or machinery, and one of his servants is injured thereby, such negligence is that of a fellow servant. *Foster v. Railway Co.*, 14 Minn. 360; *Collins v. Railroad Co.*, 30 Minn. 31; *Connelly v. Railway Co.*, 38 Minn. 80; *Randall v. Railroad Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243. The plaintiff relies in support of his proposition upon the following cases, in this court: *Erickson v. Railroad Co.*, 41 Minn. 500; *Anderson v. Mill Co.*, 42 Minn. 424; *Westaway v. Railway Co.*, 56 Minn. 28; *Schulz v. Railway Co.*, 57 Minn. 271. These cases are not in point. In the first one the law of fellow servants was not involved, for the plaintiff in that case was not a servant of the railway company, but of an independent contractor. The remark quoted in his brief by counsel, from the opinion and syllabus of the case cited, to the effect that the duty of the defendant to plaintiff in respect to giving proper signals of

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the approach of trains was the same whether the plaintiff was in its employment or that of its contractor, means only that the railway company owed the same obligation to exercise care for the safety of an employee of a contractor working on or near its tracks as it would if he was its own employee. It is to be remembered that the case arose and the opinion was written after chapter 13, Laws 1887 (defining the liabilities of railroad companies for injuries to their servants by the negligence of fellow servants), was enacted. In the second case cited, the negligence of the employee of one person resulted in the injury of an employee of another. No question of fellow servant was involved. The third case related to the duty of a railroad company to a traveler to give its usual signals of the approach of its trains at a private wagon crossing. The last case cited arose after chapter 13, Laws 1887, became a law. The plaintiff and the motorman in the case at bar were fellow servants. *Neal v. Railroad Co.*, 57 Minn. 365. The plaintiff was injured by the negligence of the motorman in failing to give any signal of the approach of the car, or to slacken its speed, as it was his duty to do. But such duties did not appertain to the work of furnishing, constructing, or equipping a safe place for work, or safe machinery for the execution of the work, but to the operation of the street railway; hence his negligence in the premises was that of a fellow servant, and the plaintiff cannot recover.

The plaintiff further claims that the fact that the car which struck him was being run at the time at a rate of speed exceeding six miles an hour, in violation of law, renders the defendant's liability for his injuries absolute. Statutes and ordinances regulating the speed of railway trains, providing for the giving of signals at crossings, and for fencing the right of way, do not abrogate the qualifying principle of the common law relating to contributory negligence, assumption of risks, and injuries by the negligence of fellow servants. *Randall v. Railroad Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243; *Fleming v. Railroad Co.*, 27 Minn. 111; *Johnson v. Railway Co.*, 29 Minn. 425; *Moser v. Railroad Co.*, 42 Minn. 480. The fact that one of the acts of negligence of the motorman complained of in this case was prohibited by law does not affect the question of the liability of the defendant to the plaintiff for injuries resulting solely from the negligence of his fellow servant. Order affirmed.

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WESTERN MARYLAND R. CO.

v.

STOCKSDALE.

(Maryland Court of Appeals, March 26, 1896.)

Defective Ticket—Ejection of Passenger.—A railroad ticket is conclusive as between the conductor and the passenger if, upon its face, it does not entitle the passenger to a passage, even though the defect is due to a mistake of the ticket agent, and the conductor may rightfully eject the passenger if he refuses to pay his fare upon demand.

APPEAL from Baltimore city superior court. *Reversed.*

Charles Marshall, Wm. L. Marbury, and J. M. Marshall,
for appellant.

Geo. R. Gaither, Jr., and Harry M. Clabaugh, for appellee.

BRISCOE, J.—This is an action of trespass to recover damages for the unlawful expulsion of the plaintiff from a train on the defendant's road. There is no dispute as to the material facts. On Sunday, August 20, 1893, the plaintiff asked the ticket agent of the defendant company at Westminster, Md., for a round-trip ticket to Emory Grove Camp. The agent gave him a ticket to Glyndon and return, and called his attention to the fact that the Emory Grove tickets were not sold on Sundays, but that the Glyndon ticket would do as well, since the two stations were only a quarter of a mile apart. The plaintiff accepted the ticket. The return coupon read as follows:

Western Maryland Railroad Company.
Temperance Camp Meeting.
Excursion Ticket.
One Continuous Passage.
Glyndon
to
Westminster.

In consideration of the reduced rate at which this ticket is sold, it will not be received for passage after Friday, August 25th, 1893.

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This ticket will not be good for passage to or from intermediate stations, and will not be received for return passage unless stamped by the secretary of Temperance Camp Meeting Association, at Temperance Camp Ground.

Sample. Not Good to Stop Off.
B. H. Griswold,
Gen'l Passenger Agent.
To the Purchaser.

Sample.

Read the above contract, and take notice that the return part of this ticket must be stamped by the Secretary of Temperance Camp Meeting Association, at Temperance Camp Ground, before it will be honored for passage.

It appears from the evidence that the plaintiff went first to Glyndon, for the purpose of having his ticket stamped by the secretary of the Temperance Camp Meeting. There he was informed that the Temperance Camp had closed on August 9th; that the secretary had left the grounds, taking the stamp with him, and there was no one there authorized to stamp the return coupon. There was an arrangement between the Temperance Camp at Glyndon and the Emory Grove Camp, adjoining, that the exercises of the former should close on August 9th, and the exercises of the latter begin on the next day, and continue until August 25th. It further appears that the officers of the Temperance Camp at Glyndon had an agreement with the defendant company by which excursion tickets over the road were sold at a reduced rate, but their evidence was to the effect that they were under no obligation to provide for the stamping of return coupons after August 9th, when the meeting ended. The Emory Grove Camp had a similar contract for the sale of excursion tickets, but these tickets were not to be sold on Sundays. The agent of the defendant at Westminster, who sold the plaintiff the ticket, did not know that the Temperance Camp was over; and it was in consequence of a mistake either by him, or by the officials of the defendant company, or by the officers of the Temperance Camp, as to the nature of the oral agreement for the sale of excursion tickets to Glyndon, that the plaintiff, on the day in question, received a ticket which required the return coupon to be stamped by the secretary of the Temperance Camp. The plaintiff, after his effort to have his ticket stamped, spent the day and night at Emory Grove, and, on his return the next day to Westminster, offered the return coupon, and explained why it had not been stamped. The conductor, however, refused to accept the unstamped coupon,

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and demanded the regular fare, of 40 cents. The plaintiff, at that time, had in his pocket not only money sufficient to pay the fare, but also a 1,000-mile ticket over the defendant road. He insisted, however, upon his right to travel upon the return coupon; and, upon his refusal to pay the fare, the conductor compelled him to leave the train. He was expelled from the train about 10 miles from Westminster, and walked the whole way to that place. The judgment below being for the plaintiff, the defendant has appealed.

In the view we take of this case, it will not be necessary for us to decide all the questions argued on the appeal. If the plaintiff was not entitled to travel on the ticket so offered by him, and refused to pay the fare when demanded, then ejection from the train was lawful, and no damages therefor can be recovered in an action of tort. A railroad ticket is not only a token that the passenger has paid his fare, and is entitled to passage, but it is also, in many cases, the contract between the passenger and the company. In *Pennington v. Railroad Co.*, 62 Md. 95, this court held that when the ticket is sold for less than the usual rate, upon the condition that it shall not be used after a limited time, then, if the passenger accepts and uses the ticket, he makes a contract with the company according to the terms stated. In all cases when the question as to the right of a passenger to travel arises between him and the conductor of a train, the ticket is, necessarily, the conclusive evidence of the nature and extent of the passenger's right. No other rule, says COOLEY, C.J., in *Hufford v. Railway Co.*, 53 Mich. 118, 18 Am. & Eng. R. Cas. 336, can protect the conductor in the performance of his duties, or enable him to determine what he may or may not lawfully do in managing the train and collecting fares. The public is interested in having the rules whereby conductors are to govern their actions certain and definite, so that they may be enforced without confusion, and without stoppage of trains; and if the enforcement causes temporary inconvenience to a passenger who, by accident or mistake, is without proper evidence of his right to a passage, though he has paid for it, it is better that he should submit to the temporary inconvenience than that the business of the road be interrupted, to the general annoyance of all who are upon the train. *Poulin v. Railroad Co.*, 52 Fed. Rep. 197; *Railroad Co. v. Bennett*, 50 Fed. Rep. 496; *Townsend v. Railroad Co.*, 56 N. Y. 295.

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It has been held in many cases that when a passenger receives a wrong ticket from an agent of the company, by reason of the mistake or negligence of the agent, the conductor may refuse to accept such ticket, and is authorized to compel him to leave the train if payment of the fare is refused. In these cases the passenger should pay the fare demanded, and seek his remedy by an action for the breach of the contract, and not by an action of tort for the ejection. *Bradshaw v. Railroad Co.*, 135 Mass. 407; *Shelton v. Railroad Co.*, 29 Ohio St. 214; *Railroad Co. v. Griffin*, 68 Ill. 499; *Yorton v. Railway Co.*, 54 Wis. 234; *Frederick v. Railway Co.*, 37 Mich. 342; *McKay v. Railway Co.*, 34 W. Va. 65. There are some cases that hold the contrary doctrine, but the weight of authority is against it. In *McClure v. Railroad Co.*, 34 Md. 532, the plaintiff bought a through ticket on defendant's road, from New York to Baltimore, which was taken up by the conductor of a through train upon which plaintiff began the journey, and plaintiff received a "check" declared upon its face to be good for this day and train only. The plaintiff got off at a way station, where he was told by some one in the ticket office that the check would be good on another train and day. Some days afterwards, the plaintiff boarded another train at the way station, to complete the journey, and offered the check as evidence of his right to travel. It was rejected, and the plaintiff was put off upon his refusal to pay the fare. This court held that, under the contract made by the ticket, he had no right to stop off, and afterwards use the check on another train, and that he was lawfully ejected.

Now, in the case under consideration, the contract between the plaintiff and the defendant company, as evidenced by the ticket, was that the plaintiff should be entitled to passage from Glyndon back to Westminster, upon the condition precedent that the return coupon be stamped by the person clearly designated upon the face of the ticket. This condition the plaintiff was unable to comply with, for the reasons which have been stated. But, when the plaintiff entered the train to return, he offered to the conductor, as evidence of his right to travel, a ticket which upon its face was not good and effectual for that purpose, because the condition upon which its validity depended had not been performed; and of this fact the plaintiff had full knowledge. Upon the refusal of the conductor to accept this

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defective ticket, the plaintiff should have paid the fare demanded, and afterwards sought compensation from the company for the breach of its contract. Since the ticket is the conclusive evidence of the extent of the passenger's right as between him and the conductor, the latter was justified in refusing to accept the defective ticket offered by the plaintiff, and in compelling him to leave the train upon his refusal to pay the fare. The case of *Mosher v. Railway Co.*, 127 U. S. 390, 34 Am. & Eng. R. Cas. 339, is somewhat like the one now under consideration. There the passenger purchased of the defendant company a ticket expressed on its face to be "good for one first-class passage to Hot Springs, Ark., and return, when officially stamped on the back." The plaintiff was unable to find any agent at Hot Springs to stamp his ticket, and was put off of one of the defendant's trains, upon the refusal of a conductor to accept the unstamped return coupon. The defendant was not liable for the absence of an agent at Hot Springs to stamp the ticket, because its liability was limited by contract to its own road, which did not extend to Hot Springs. In the opinion of Justice GRAY, he says: "The conductor of the defendant's train, upon the plaintiff's presenting a ticket bearing no stamp of the agent at Hot Springs, had no authority to waive any condition of the contract, to dispense with the want of such stamp, to inquire into the previous circumstances, or to permit him to travel on the train. It would be inconsistent alike with the express terms of the contract of the parties, and with the proper performance of the duties of the conductor, in examining the tickets of other passengers, and in conducting the train with due regard to speed and safety, that he should undertake to determine, from oral statements of the passengers or other evidence, facts alleged to have taken place before the beginning of the return trip, and as to which the contract on the face of the ticket made the stamp of the agent of the Hot Springs Railroad Company at Hot Springs the only and conclusive proof." The case of *Railroad Co. v. Rice*, 64 Md. 63, upon which the appellee relies, is clearly distinguishable from this case. There the ticket presented by the passenger was apparently good. One conductor had, through a mistake, canceled it, but attempted to correct the mistake, and assured the passenger that it was "all right." Another conductor refused to accept the ticket, because the correction had not

been made in accordance with the rules of the company. The passenger had no notice or knowledge of the rules, and he was authorized, under these circumstances, to believe that the ticket offered by him was valid. The case of *Railroad Co. v. Winter*, 143 U. S. 60, 52 Am. & Eng. R. Cas. 328, is similar in principle to *Rice's Case*. The difference between these two cases and the case here is that in the former the tickets were apparently good on their face, and the passengers had no notice of any defects, while in the case here the ticket on its face was obviously not good, and was notice to the plaintiff that it did not entitle him to passage.

It follows, then, that there was error in granting the plaintiff's first prayer, which instructed the jury that, upon the undisputed facts of the case, the plaintiff was entitled to recover, and also error in rejecting the defendant's prayers, which, upon the same facts, denied the plaintiff's right to recover. There was no question made in this court as to the measure of damages laid down by the court below. For these reasons, the judgment will be reversed, without prejudice. Judgment reversed, with costs.

NOTES.

Defective Ticket—Expulsion from Trains—*a. View that Conductor may expel Passenger.*—There is much conflict upon the question of the rights and duties of the conductor and passenger respectively, when an authorized agent sells the passenger a ticket different from what he asks and pays for, and one which does not entitle him to the passage desired. According to some authorities, the conductor cannot be expected to listen to the passenger's account of the transaction, and the latter should either pay his fare, or walk quietly off the train, and then resort to an action against the company for breach of contract; but should he attempt to retain his place without paying fare, and is expelled by the conductor, he can recover no damages for the expulsion. *Peabody v. Oregon R., etc., Co.*, 21 Oregon 121; *McKay v. Ohio River R. Co.*, 34 W. Va. 65, 44 Am. & Eng. R. Cas. 395; *Weaver v. Rome, etc., R. Co.*, 3 Thomp. & C. (N. Y.) 270; *Shelton v. Lake Shore, etc., R. Co.*, 29 Ohio St. 214; *Townsend v. New York Cent., etc., R. Co.*, 56 N. Y. 295; *Beebe v. Ayres*, 28 Barb. (N. Y.) 275; *Pease v. Delaware, etc., R. Co.*, 101 N. Y. 367, 26 Am. & Eng. R. Cas. 185; *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342; *Terre Haute, etc., R. Co. v. Vanatta*, 21 Ill. 188; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Hall v. Memphis, etc., R. Co.*, 15 Fed. Rep. 57, 9 Am. & Eng. R. Cas. 348; *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234, 6 Am. & Eng. R. Cas. 322; Penn-

sylvania R. Co. *v.* Connell, 112 Ill. 295, 18 Am. & Eng. R. Cas. 339; Mahoney *v.* Detroit City R. Co., 36 Cent. L. J. 90; Petrie *v.* Pennsylvania R. Co., 42 N. J. L. 449, 1 Am. & Eng. R. Cas. 258; Poulin *v.* Canadian Pac. R. Co., 52 Fed. Rep. 197, 32 Am. L. Reg. 153; Chicago, etc., R. Co. *v.* Bannerman, 15 Ill. App. 100; Rose *v.* Wilmington, etc., R. Co., 106 N. Car. 168.

The opinion of the court in *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, explains the reason of the rule as follows: "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically, there are but two ways—one, the evidence afforded by the ticket; the other, the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law parties interested were not competent witnesses, and even under our statute the witness is not permitted in certain cases to testify as to facts which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of the contract, where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. * * * As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to its terms, or, if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case." (The action was trespass on the case for damages for unlawful expulsion.)

This case is followed in *Hufford v. Grand Rapids, etc., R. Co.*, 53 Mich. 121, 18 Am. & Eng. R. Cas. 336. But upon a second trial of that case, the rule of conclusiveness of the ticket, as between conductor and passenger, was so far abandoned, that the court held, that if the passenger had bought a ticket of a duly authorized agent, believing in good faith that it was genuine, and that the agent had a right to sell it, and states such facts to the conductor, the latter is bound to accept the statement until the contrary is shown, regardless of any words, figures or other marks upon the ticket. And where, upon such passenger's refusal to pay fare, the conductor lays hands upon him to eject him, he is guilty of assault and battery, for which

the company must respond in damages. *Hufford v. Grand Rapids, etc., R. Co.*, 64 Mich. 631, 28 Am. & Eng. R. Cas. 129. See p. 518.

b. View that he may not.—Other authorities hold that the conductor has no right to expel the passenger, and if he does so, the company is liable in damages therefor. *Ellsworth v. Chicago, etc., R. Co. (Iowa)*, 29 L. R. A. 173; *City, etc., R. Co. v. Brauss*, 70 Ga. 368, 18 Am. & Eng. R. Cas. 324; *Head v. Georgia Pac. R. Co.*, 79 Ga. 358; *Georgia, etc., R. Co. v. Dougherty*, 86 Ga. 744; *Lake Erie, etc., R. Co. v. Fix*, 88 Ind. 381, 11 Am. & Eng. R. Cas. 109; *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634; *Pennsylvania R. Co. v. Bray*, 125 Ind. 229; *Chicago, etc., R. Co. v. Conley*, 6 Ind. App. 9; *Carpenter v. Washington, etc., R. Co.*, 3 Mackey (D. C.) 225, 18 Am. & Eng. R. Cas. 370. See also *Hufford v. Grand Rapids, etc., R. Co.*, 64 Mich. 631; *Gulf, etc., R. Co. v. Rather*, 3 Tex. Civ. App. 72.

The defendant's ticket agent represented to the plaintiff that it was necessary to purchase but one ticket to enable him to pass over the road, stopping over one night at an intermediate station, and that the conductor would give a stop-over check to enable him to do so. At the time these representations were made, and in consequence of them, the plaintiff having informed the agent of his desire to stop over, purchased the ticket, paying the fare demanded for the whole distance. On the second day his ticket was refused by the conductor, upon the ground that it was indorsed "good for this day only," and the plaintiff, refusing to pay the fare demanded, was expelled from the cars. *Held*, that in an action against the company such representations of the ticket agent were admissible in evidence; and that the conductor, having been informed of these representations, was not authorized to expel the plaintiff from the train, without first offering to return the excess of fare paid or to deduct it from the fare demanded, though the rules of the company prohibited passengers from stopping over upon such tickets. *Burnham v. Grand Trunk R. Co.*, 63 Me. 298.

Conductor's Mistake.—In *Sheets v. Ohio River R. Co.*, 39 W. Va. 475, the mistake was that of the conductor. Plaintiff had purchased a round-trip ticket which he was informed by the agent was good for passage and return on all defendants' passenger trains. When returning, he boarded a train upon which the conductor informed him his ticket was not good. He was ejected, and the excuse of the company was that the conductor had not yet been informed that such tickets were good upon his train. *Held*, that the company was liable. See page 518, "Defective on its face." In *Philadelphia, etc., R. Co. v. Rice*, 64 Md. 63, 26 Am. & Eng. R. Cas. 264, distinguished page 514, the conductor canceled the ticket by mistake and afterwards tried to correct it, but did so in an improper way, and the passenger was expelled by a subsequent conductor. It was held that he had a right of action against the company for the expulsion.

Waiver.—But if a person receives from a ticket agent a ticket different from what he asks for, and keeps it four months, with full

knowledge of its purport, without making complaint, he will be considered as having ratified the contract according to its terms and waived such claims as he might have had growing out of the mistake. *Godfrey v. Ohio, etc., R. Co.*, 116 Ind. 30, 37 Am. & Eng. R. Cas. 8.

c. Defective on its Face.—There has been a tendency in some of the later cases as in the principal case to draw a distinction between cases where defects are apparent upon the face of the ticket and those in which the tickets were apparently good, holding the company responsible in the latter case only. Thus in *Murdock v. Boston, etc., R. Co.*, 137 Mass. 299, 21 Am. & Eng. R. Cas. 268, it is said: "The ticket seller assumed to know and gave assurances which the plaintiff had a right to rely on, and which he did rely on. If, when the conductor refused to accept the punched ticket, it had appeared on an inspection of it that there had been a mistake, and that it did not on its face purport to be good for a passage over that part of the defendant's road, and that the ticket seller had delivered to the plaintiff a good ticket upon some other railroad, or to some place which had already been passed, when the mistake was discovered, and it was found that the plaintiff had through inadvertence accepted a ticket which on its face was plainly insufficient, then this case would have fallen within the doctrine of the recent decision in *Bradshaw v. South Boston Railroad*, 135 Mass. 407, and it would have been the duty of the plaintiff to yield for the time being, and pay his fare anew or withdraw from the car, unless a distinction should be taken between the rights of passengers upon steam railways and street railways, under such circumstances,—a question which we do not now consider. See *Cheney v. Boston, etc., R. Co.*, 11 Met. (Mass.) 121; *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234; *Townsend v. New York Cent., etc., R. Co.*, 56 N. Y. 295; *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432; *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532. But in the present case such is not the position of the parties."

And see the Maryland case of *Philadelphia, etc., R. Co. v. Rice*, 64 Md. 63, distinguished in the principal case.

Plaintiff bought a ticket in Boston entitling him to a passage over defendant's road. At the time he informed the ticket agent of his wish to stop off at the Olean station, and was then told by the agent that he would have to speak to the conductor about that. Between Binghamton and Olean the plaintiff informed the conductor that he wished to stop over at Olean, and the conductor, instead of giving him a stop-over ticket, punched his ticket and told him that was sufficient to give him the right to stop over at Olean, and afterwards to use the punched ticket between Olean and Salamanca. He made the stop, and taking another train to Salamanca, presented the punched ticket, informing the conductor of what had taken place. The conductor refused to take it and demanded full fare. The payment of this being refused, the conductor stopped the train

at the next station and ejected him from it, using such force as was necessary. *Held*, that the company was liable for the act of the conductor. New York, Lake Erie, etc., R. Co. v. Winter, 143 U. S. 60, 52 Am. & Eng. R. Cas. 328. Compare Mosher v. St. Louis, etc., R. Co., 127 U. S. 390, 34 Am. & Eng. R. Cas. 339.

By mistake a ticket agent selling a mileage ticket good for one year from issue stamps upon it, as the date of issue, 4th March, 1892, instead of 1893, and after the figures 189— writes the figure 3, making the date of the expiration of the book 4th March, 1893, and then corrects the latter mistake by writing over the 3 the figure 4, making it read 1894, not correcting the 1892. On 24th of April, 1893, the holder tenders this book in payment of fare, but it is rejected as out of date, and he is ejected from the train after explaining to the collector that the agent had made the mistake, and he had himself not altered the ticket, and asking that the collector wait until the train reached Huntington, where the book was sold, so that the collector would be satisfied that the book had not been fraudulently altered; and the collector made no inquiry at any of several telegraph stations of the railroad company as to it. The passenger can recover damages of the company. The court said: "In the McKay case, 34 W. Va. 65, we held that where a railroad company agreed to sell a ticket for passage between certain points, but by mistake wrote the ticket for passage to other points, the passenger could not ask passage where the ticket did not carry him, it being apparently not good for the passage demanded; and the passenger leaving the car at the command of the conductor, but without force, could not sue in tort, but must sue for breach of contract by the company in agreeing to carry him that passage, and failing therein by not giving him the ticket contracted for. That case was confessedly somewhat close, but I still think it was rightly decided, and sustained by cases of eminent authority. There the ticket showed nothing for, and all against, the right of the passenger to the ride, which he claimed, and was transparently not good,—a mere blank or nullity as to the ride claimed; while here it is apparently good, more apparently good than bad, and turning out in the end to be good. There is a difference, though it cost reflection to see it: In this case I go upon the theory, which I think is correct, that the plaintiff's grievance is not a breach of contract in agreeing to sell him a ticket for a certain passage, and giving him a wrong ticket, as in the McKay case, but in the fact that he had a ticket entitling him to go to Huntington as he demanded, and in its wrongful rejection and his expulsion. He had a ticket turning out ultimately to have been good from the start. The confusion as to date arising from the agent's error, without fault in the passenger, does not change its validity." Trice v. Chesapeake & O. R. Co., 40 W. Va. 271.

Plaintiff purchased a ticket entitling him to transportation over defendant's road from Detroit, *via* Port Huron, to Trenton, Canada, and return. The conductor of the Detroit and Port Huron division took up the going portion of the ticket, but failed to give him a

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check as evidence of his right to ride from Port Huron to Trenton, as required by the rules of the company. Plaintiff refused to pay his fare over the Port Huron and Trenton division. The conductor refused to recognize the return coupon as evidence of such payment, and ejected plaintiff from the train without unnecessary force, and plaintiff sued defendant in case for such ejection. And it is held that it was the duty of plaintiff to leave the train peaceably or pay his fare and seek his remedy for damages resulting from either necessity as the situation at the time required; and that a recovery was properly limited to the value of the ticket of which he had been wrongfully deprived by the first conductor, it appearing that plaintiff had the money with which to pay his fare, and afterwards paid it, and completed his journey by a later train. The court said: "The case is not one where the ticket on its face was apparently good, and where it was so understood by the passenger, as was the case in *Hufford v. Grand Rapids, etc., R. Co.*, 53 Mich. 121, 18 Am. & Eng. R. Cas. 336, 64 Mich. 631, 28 Am. & Eng. R. Cas. 129. On the contrary, in the present case no ticket was produced between Port Huron and Trenton." *Van Dusan v. Grand Trunk R. Co.*, 97 Mich. 439. And see *Hufford v. Grand Rapids, etc., R. Co.*, 64 Mich. 631, 28 Am. & Eng. R. Cas. 129.

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CAMDEN HORSE-RAILROAD CO.**SCOTT et al. v. SAME (two cases).***(Court of Errors and Appeals of New Jersey, March Term, 1895.)*

Construction of Charter of Street Railway.—The special act of March 11, 1872 (P. L. 1872, p. 512), which authorizes the Camden Horse-Railroad Company to build a railroad or railroads on "any public road or highway extending from the city of Camden into the county of Camden," does not empower the company to build a railroad upon a public highway no part of which touches the city of Camden, but does empower it to build more railroads than one upon the highways mentioned in the act.

Consent to Lay a Street Railroad.—A municipal consent to the laying of "a street railroad" in and along the streets of the municipality is not a consent to the laying of two distinct street railroads.

Consent must be Given in Corporate Meeting.—When a statute requires "the consent of the township committee" to legalize the laying of a street railroad in the township, it is necessary that the consent should be given

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when the members of the committee, or a majority of them, are assembled in corporate meeting.

Declaration of Individual Members.—The declarations of individual members of a township committee are not legal evidence to prove prior acts of the corporate body, nor is the public estopped by such declarations.

Position of Tracks must be Defined.—Under the traction companies act of March 14, 1893, a municipal consent to "the location of tracks" is invalid if it does not define the position of the tracks in the street.

Consent of Township Committee Necessary.—Under the act of March 9, 1893 (P. L. 1893, p. 144), the consent of the township committee is necessary to legalize the construction of street railroads in any township.

Power of Municipal Authorities to grant Exclusive Right to Second Railway.—If a company has legislative power to build a railroad on a designated street, provided the municipal authorities consent thereto, and it commences to build such railroad without municipal consent, the municipal authorities cannot grant to another company the exclusive right to build a railroad in that street, without giving to the first company notice and an opportunity to be heard.

APPEAL from court of chancery. *Affirmed on traction company's appeal. Reversed on other appeals.*

Thomas E. French and *Mark R. Sooy* (Lindley M. Garrison, of counsel), for appellant West Jersey Traction Company.

Jonas S. Miller (Thomas E. French, of counsel), for appellants Charles W. Scott and others.

Edward A. Armstrong and *David J. Pancoast* (Thomas N. McCarter, of counsel), for respondent.

DIXON, J.—On June 21, 1893, the West Jersey Traction Company filed a bill of complaint to restrain the Camden Horse-Railroad Company from constructing a street railway, in the township of Stockton, Camden county, from the bridge over Cooper's creek, which divides the township from the city of Camden, along State street, to Fourth street, and, along Fourth street and the River road, to the line between Stockton and Pensauken townships. The traction company based its claim upon the ground that, by certain proceedings stated in the bill, it had become invested with an absolute and exclusive right to lay its tracks along said streets, and that the construction and operation of a railroad thereon by the Camden Company would be an invasion of the complainant's right, and would cause the complainant irreparable injury. On August 14, 1893, the Camden Horse-Railroad Company filed a bill of complaint, and on August 17, 1893, it filed another bill of complaint, the object of which bills was to enjoin the West Jersey Traction Company, the inhabitants of

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the township of Stockton, in the county of Camden, and the members of the township committee of said township, from interfering with the construction of a street railroad along Fourth street, in said township, by the Camden Company. After answers filed by all the defendants, these causes were heard together, and resulted in decrees dismissing the bill of the traction company, and granting to the Camden Company the relief for which it prayed. The traction company appeals from the decree dismissing its bill, and also from the decree rendered on the bill filed August 17th, in which it was a defendant. The township corporation and the members of the township committee appeal from the decrees rendered on the bills filed August 14th and August 17th, in both of which they were defendants.

In disposing of the questions raised by these appeals, it is convenient to consider first the right of the Camden Company to construct a street railway along Fourth street, as claimed in its bills. The company was chartered by act of March 23, 1866 (P. L. 1866, p. 640), which empowered it to build and operate a railroad on certain streets within the city of Camden only. A supplement to the charter, approved April 2, 1868 (P. L. 1868, p. 638), likewise confined it to the city of Camden. Another supplement, passed March 11, 1872 (P. L. 1872, p. 512), authorized the company "to build, maintain and use a railroad or railroads on any public road or highway in the city of Camden, or on any public road or highway extending from said city into the county of Camden." Upon the last clause of this supplement the company bases a right to build a railroad along Fourth street. We cannot concede this claim. Fourth street is not a "road or highway extending from the city of Camden into the county." It lies wholly in Stockton township, and no part of it touches the city of Camden. True, it crosses State street, which extends out of the city into the township, and it ends in Federal street, which also extends out of the city into the township; but it is as distinct from either State street or Federal street as any two intersecting streets can be from each other. To support this claim of the company, we must interpret the language of the statute as though it read that the company might build "a railroad or railroads extending from Camden city into the county on any road or highway,"—an interpretation which would require greater latitude of construction than

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is permissible in public grants. The legislature defined the highways which the company might use, not the railroads, and the company cannot go beyond the terms of the definition. On April 5, 1878, an act was passed (Supp. Revision, p. 368) authorizing certain street-railway companies to extend their tracks in any county, "provided the consent of the township committee * * * of the township, upon the streets or roads of which it is proposed to lay such tracks, shall first have been had and obtained." Under this act, also, the company contends it is entitled to lay its tracks along Fourth street, in pursuance of a consent given by the township committee on May 12, 1892; and it produces a writing of that date, signed by the three persons who then composed the committee, certifying that permission had been, and thereby was, granted to the Camden Horse-railroad Company "to lay and operate in and along the streets, roads, avenues, and highways of the township of Stockton a street railroad." Passing by the questions whether this statute is special, and so unconstitutional, and whether the Camden Company is embraced within its provisions, we think that, according to the terms of the above certificate, only one street railroad was authorized, and that the authority was exhausted by the construction, shortly afterwards, of the Merchantville line. The fact that the language of the certificate is broad enough to embrace all the highways in the township does not counteract the restrictive force of the words "a street railroad," since a single street railroad may traverse any number of streets. The evidence is that, when this certificate was signed, the Camden Company had in contemplation the immediate construction of a railroad through the township from the city of Camden to Merchantville, and that forthwith it built such a railroad, which was completed during the summer of 1892, and has been in operation ever since. The proposed railroad along State and Fourth streets is entirely distinct from this Merchantville line. Under the terms of the certificate, the company had the right of selection among all the highways in the township for the building of a street railroad; but the selection being once made, and the railroad constructed, the right ended. *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. L. 205; *Allen v. Board*, 13 N. J. Eq. 68. A consent that the company might, at all times thereafter, lay as many railroads as it chose, on any highways within the township,

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would, even if legal, be so unreasonable that it could not be judicially inferred where it was not couched in unquestionable terms.

But, even if the language of this instrument were as broad as the Camden Company contends for, we would still be of opinion that the company's claim must be denied, because it appears that the consent so expressed was not the lawful consent of the township committee. The second section of "An act concerning townships and township officers," approved April 21, 1876 (Revision, p. 1202), provides that the clerk of the township shall act as clerk of the township committee, and keep a record of its proceedings, and record the same in the town book. The town book of the township of Stockton contains no record indicating that the committee ever gave the consent alleged. In view of the public duty of the town clerk, the absence of such a record shows, *prima facie* at least, under the maxim "*Omnia rite acta præsumuntur*," that no consent was given by the committee. This presumption of fact was not rebutted by the proofs. According to the evidence, the certificate above mentioned was signed by each of the three subscribers in the absence of his fellows. As the statute requires the consent of the "township committee," it was essential to a valid consent that it should be given when the members, or a majority of them, were assembled in corporate meeting. *Schumm v. Seymour*, 24 N. J. Eq. 143; 19 Am. & Eng. Enc. Law, 467. Hence this certificate cannot be itself the statutory consent.

It is argued, however, that, since the certificate states that permission had been granted, it is evidence from which the giving of a joint consent at some previous time may be inferred. But this position is untenable, for the reason that the declarations of the several members of the board, whether oral or written, are not, by any statute or by any legal rule, admissible to prove prior acts of the corporate body. The testimony of witnesses at the hearing favors, rather than repels, the belief that no consent was ever voted by the committee when assembled as a body.

But it is further insisted that as the Camden Company acted upon the supposition that this certificate was the requisite consent, or was conclusive evidence of it, the public authorities are estopped from denying such consent. The answer to this is that neither for the purpose of giving con-

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sent, nor for the purpose of making evidence that consent had been given, were the members of the committee, when separated, the representatives of the public; their conduct then was that of private individuals. Moreover, the legislature having provided that the official proceedings of the committee should be recorded in the town book, the Camden Company was not justified in relying on unwarranted assertions as to the acts of the committee, and the public cannot be estopped thereby. *Kean v. City of Elizabeth*, 55 N. J. L. 337.

With respect to the implied consent growing out of the alleged approval by the township committee of a grade map of Fourth street, in July, 1893, it suffices to say that, previously, the traction company had applied to the committee for permission to construct a street railroad along that street, and the committee had granted, or attempted to grant, such permission, and that, under these circumstances, a subsequent consent to build such a railroad on the same street could not lawfully be given to the Camden Company without notice to the traction company. *West Jersey Traction Co. v. Board of Public Works of City of Camden*, 56 N. J. L. 431, affirmed, on error, March term, 1895.

Our conclusion is that the Camden Company has never acquired a perfect right to construct a street railway along Fourth street, and, therefore, that the decrees rendered on the bills filed by it on August 14th and August 17th should be reversed, and the bills dismissed.

We come now to the questions raised by the bill of the West Jersey Traction Company, the first of which is whether that company has shown itself to be invested with an absolute and exclusive right to lay tracks from the bridge over Cooper's creek, along State street, to Fourth street, and, along Fourth street and the River road, to the easterly line of Stockton township. The company was formed on May 13, 1893, by the filing with the secretary of state of a certificate of incorporation under the traction companies act of March 14, 1893 (P. L. 1893, p. 302). Simultaneously with the filing of this certificate, there were filed in the same office a description and map of six routes of railway proposed to be built by said company, one of which covered the streets in question; and on June 20, 1893, the company filed with the secretary of state a copy of a resolution which, on the previous day, had

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been adopted by the Stockton township committee, purporting to give the committee's consent to the "location of tracks" by the traction company along those streets, and also an acceptance by the company of such location. This consent was evidently designed to be the consent to the location of tracks provided for in the seventh section of the statute last mentioned, but, as it utterly fails to indicate the location of the tracks in the streets named, it is invalid as a consent under that section, for the reason stated in *State v. Mayor, etc., of Newark* (N. J. Sup.), 30 Atl. 528. It may be, however, in substance, a consent to the location of the route under section 6, and we will proceed to consider it in that aspect. According to the statute, such a consent, if properly granted, secures to the company an exclusive right for a limited time to build the line of railway indicated,—that is, an exclusive right to the route,—subject, of course, to the obtaining of municipal consent to the location of tracks thereon. The question therefore arises whether this consent to the location of the route was properly granted. The statute does not require notice to be given of an application for consent to the route, and, as such consent does not usually affect private rights, notice to particular persons is not generally necessary. *State v. Mayor, etc., of Jersey City* (N. J. L.), 30 Atl. 531. But, in the present instance, we think the relations of the Camden Horse-Railroad Company to the State street portion of the route, at least, were such as to require that notice should be given to that company before this application could lawfully be granted.

As already stated, the supplement to the charter of the Camden Company passed March 11, 1872, authorized the company "to build, maintain, and use a railroad or railroads on any public road or highway in the city of Camden, or on any public road or highway extending from said city into the county of Camden." State street is a public highway, extending from the city into the county of Camden, and was therefore within the range of this grant. The traction company contends that, under this supplement, the Camden Company obtained the right to use only one road leading from the city into the county, and that, by building the railroad on Federal street, from the city, through the township of Stockton, to Merchantville, in 1892, it had exhausted the right. But we deem this interpretation of that statute too

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strict to satisfy its terms. Its language is, "to build a railroad or railroads on any public highway." Now, although the words "any highway" more aptly denote the selection of a single highway than the selection of several, yet it is not incapable of the latter signification; and to accord with the context in this statute, which authorizes the building of railroads, it must have the broader meaning, or else we must suppose that the legislature contemplated the construction of several railroads on the same highway by the same company. That supposition cannot be entertained, and therefore it follows that the power to build a railroad on State street remained. On March 9, 1893, the legislature passed an act to prohibit the laying or construction of any street or horse railroad along the streets of any municipality of this state without the consent of the governing body having the control of the streets in such municipality, which act repealed all acts, general, special, or local, inconsistent with its provisions. P. L. 1893, p. 144. This act embraces townships (*State v. Wiley*, 46 N. J. L. 473); and in view of the act of March 8, 1893 (P. L. 1893, p. 130), increasing the powers of township committees, there can be no doubt those committees are in townships the governing bodies whose consent is required. At the time this act was passed, the Camden Company had done nothing towards the laying of a railroad along State street, in Stockton township; and as the supplement of 1872, authorizing it to build such a railroad was subject to alteration and repeal, it is clear that after March 9, 1893, the company could not lawfully construct a railroad in that street without the consent of the township committee; it being within the reserved power of the legislature thus to modify the franchise, which depended wholly upon the repealable statute, and under which no property rights had been acquired. *Zabriskie v. Railroad Co.*, 18 N. J. Eq. 178; *Railroad Co. v. Maine*, 96 U. S. 499; *Greenwood v. Freight Co.*, 105 U. S. 13, 21; 9 Am. & Eng. R. Cas. 526.

It thus appears that on June 19, 1893, when the township committee voted this consent to the traction company, the Camden Company had legislative authority to build a railroad on State street, in the township, provided the committee consented thereto. It also appears that before that time the Camden Company had actually commenced to construct a railroad on that street, and had proceeded so far in the work

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as to justify inference that the township committee had become aware of its design. Under these circumstances, the committee could not lawfully confer the exclusive right to build such a railroad on the traction company without giving to the Camden Company notice, and an opportunity to be heard. *West Jersey Traction Co. v. Board of Public Works of City of Camden, supra.* No such opportunity was afforded. A certain notice had indeed been published in a local newspaper that the township committee would meet at the time stated, to consider the petition of the traction company for the location of its tracks in the township, conformably to the routes described in the office of the secretary of state; but it does not appear that the Camden Company had actual notice of that publication, and the statute does not make it constructive notice of an application for a consent to the route. Even if the publication had come to the knowledge of the Camden Company, it was too indefinite (the case being one where special notice was necessary) to inform that company of a purpose to consider a route which included State street. It should have been sufficiently explicit to indicate to the company that its interests were involved. *Vantilburgh v. Shann*, 24 N. J. L. 740; *State v. Mayor, etc., of Jersey City*, 35 N. J. L. 404; *Bowker v. Wright*, 54 N. J. L. 130. Consequently, we think the consent given was invalid as to State street; and, since the route approved was an entirety, the consent must wholly fail. For this reason, the traction company had not acquired the right upon which it based its claim for relief, and its bill was properly dismissed.

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ROBERTSON

v.

STEAD.

(Supreme Court of Missouri, Div. No. 1, June 23, 1896.)

Power of Receiver appointed by Foreign Court to Replevy Property.—A New York corporation owning and operating a railroad in Mexico having become insolvent, its property was placed in the hands of a receiver by a decree of a court of Mexico. The receiver traveled in a private car, a part of the corporate property, to St. Louis, where the car was attached at the suit of creditors of the corporation in the United States. *Held*, that the decree of the Mexican court and the subsequent possession thereunder by the receiver vested in him a special property in the car, and authorized him to maintain a suit for the recovery of it, even against the claim of creditors of the United States.

Evidence of Jurisdiction of Foreign Court.—Evidence that a court of a foreign country uniformly exercises jurisdiction in the appointment of receivers, and in controlling the affairs of insolvent corporations until the sale of their property and the application of the proceeds to the payment of their debts, if proof to the contrary is wanting, is sufficient proof, *prima facie*, to show that such court had jurisdiction to appoint a receiver for the property of an insolvent railway company.

APPEAL from St. Louis circuit court; Daniel DILLON, Judge. *Affirmed.*

W. C. & J. C. Jones and C. C. Kidd, for appellant.

Jos. S. Laurie, for respondent.

MACFARLANE, J.—This is an action of replevin to obtain the possession of a special railroad car known as the "Sierra Mojada." The Monterey & Mexican Gulf Railroad Company is a corporation of the state of New York, which owned and operated a railroad in the republic of Mexico. This corporation having become insolvent, its property was, by a decree of the federal district court for the state of Nuevo Leon, placed in the hands of plaintiff, Robertson, as receiver. Under and by authority of this decree the receiver was put into the possession of all the property of the corporation, including the car Sierra Mojada. This car was used by the managing officer of the corporation in traveling over the road and

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elsewhere on the business of the corporation. It was the private car of the executive officers of the company, and with the other property went into the possession of the receiver, within the jurisdiction of the court. In 1892 plaintiff brought the car from the republic of Mexico to St. Louis, where it was attached at the suit of Fairbanks, Morse & Co., creditors of said corporation, and citizens of the state of Illinois. Under a writ of attachment issued in that suit, which was against the corporation, the car in question was taken in possession by defendant, who is the sheriff of the city of St. Louis. This suit is by Robertson, as such receiver, to regain possession of the car.

1. The controlling controversy in this case is whether a receiver, appointed by a court of the republic of Mexico, can, as against an attaching creditor of the debtor who resides in the state of Illinois, recover, by a suit in a court of this state, the property of the debtor, which had come into possession of the receiver in Mexico, and which was brought into the jurisdiction of the Missouri court by the receiver himself. The general rule is that a receiver, appointed by a court of chancery, has no legal status outside the territorial jurisdiction of the court appointing him. He receives his powers from the court, and can only exercise them within its jurisdiction. The court itself has no power beyond the bounds of its jurisdiction, and can confer none upon the receiver. This strict rule of legal right is generally recognized. *Insurance Co. v. Needles*, 52 Mo. 17; *Booth v. Clark*, 17 How. 322; *Beach, Rec. § 680*, and note for cases. The rule, however, is not applied with the same strictness with which it is declared, but courts often, in the spirit of comity, recognize the rights and powers of receivers appointed in other jurisdictions, and allow them to sue for and recover property which they are entitled to hold under the order appointing them, or to pursue generally their remedies. This spirit of comity has been so generally acted upon as to create an exception to the rule almost as well established as the rule itself. In most courts of the United States it is only withheld when to allow it would contravene the laws or public policy of the state, or would defeat or impair the rights of resident creditors. *Beach, Rec. § 682*; *Gluck & B. Rec. § 57*, and cases cited in notes. So far as I am advised this court has never either recognized or denied this exception, nor do we

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deem it necessary to pass upon it in this case. The principle upon which we think this case must be ruled is one of law, and not of comity. The order of the federal court of Mexico required all the property of the railway corporation to be delivered into the hands of the receiver, who was directed to preserve and manage it for the benefit of all the creditors. Under this order the receiver obtained possession of the car in question within the jurisdiction of the court appointing him. The possession of the receiver was, therefore, lawful when taken. The car, with all other property of the corporation, was held for the benefit of foreign as well as domestic creditors. The creditors residing in the United States had no rights superior to those of the creditors residing within the jurisdiction of the court. It cannot be seen how those rights became paramount when the property was brought, by the lawful possessor, within the jurisdiction of the courts of the United States. Courts will protect the rights of domestic creditors, and will not permit property located in their jurisdictions to be carried away by a receiver of a foreign state or nation, until all such creditors are satisfied. But we know of no principle upon which rights of domestic creditors can be created by reason of the property, in the lawful possession of the receiver, being brought within their jurisdiction. Such a rule would greatly embarrass the receiver in the discharge of his duties, and would in many cases affect injuriously the rights of creditors. Hence it is generally ruled that, after a receiver has obtained possession of the property of the debtor within the jurisdiction of the court appointing him, such possession will be protected, into whatever jurisdiction the property may thereafter be taken by the receiver.

The order of the court, and the subsequent possession thereunder, vested in the plaintiff a special property in the car which authorizes him to maintain this suit. *Cagill v. Woolridge*, 8 Baxt. 580; *Bank v. McLeod*, 38 Ohio St. 174; *Bagby v. Railroad Co.*, 86 Pa. St. 291; *Chicago, M. & St. P. R. Co. v. Keokuk, etc., Packet Co.*, 108 Ill. 317; *McAlpin v. Jones*, 10 La. Ann. 552; *Pond v. Cooke*, 45 Conn. 126. HENRY, J., in his dissenting opinion, in argument, states the rule thus: "A suit by a receiver to recover property of which he had obtained possession, but which has been taken from him, rests upon a different ground. In such case his former possession created a special property which will support the

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action." State v. Gambs, 68 Mo. 296. This declaration, while probably not necessary to a decision of the question in issue, was not inconsistent with what was said by the majority of the court, and at least expresses the views of the learned writer. The rule is thus expressed by a recent text writer: "So long as the property is taken from the corporation and placed in the hands of the receiver, with full power, under the direction of the court, to settle the estate of the corporation, it cannot be taken from the receiver by a creditor of the corporation, but will be treated in another state precisely as it would have been by the courts of the state where the receiver was appointed, if the controversy had arisen there." Gluck & B. Rec. 183. In Chicago, M. & St. P. R. Co. v. Keokuk, etc., Packet Co., *supra*, the controlling facts were similar to the facts in this case. The property of the packet company had been put into the hands of a receiver under an order of a court in the state of Missouri. The property, including a certain barge, came into the hands of the receiver. In conducting the business of the company the receiver sent the barge to Quincy, in the state of Illinois, where it was taken by the sheriff under attachment by an Illinois creditor of the packet company. The receiver interpleaded, claiming the property under the order of court and his possession thereunder. The court held that the suit could be maintained. Upon this state of facts the court stated the law as follows: "By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the barge became vested in the receiver; and it is the established rule that, where a legal title to personal property has once passed and become vested in accordance with the law of the state where it is situated, the validity of such title will be recognized everywhere." In Pond v. Cooke, *supra*, a receiver appointed in New Jersey transported iron to the state of Connecticut, to be used in completing a contract of the debtor made prior to the appointment of the receiver. The property was taken under attachment by a creditor of the state of Connecticut. The property was claimed by the receiver. The court, in deciding the controversy, says: "Thus it appears that the property was in possession of defendant as receiver when it came into this state. He was invested with it, and was legitimately performing the duties of his appointment in completing the contract by its

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use, when it was attached by the plaintiff. In these circumstances, comity among the states requires that the case should be regarded by our courts precisely as it would have been by the courts of New Jersey had the controversy arisen there." The court says, further: "When property has once vested in a trustee, assignee, or receiver by the law of the state where the property is situated, it makes no difference whether it was done under the local law of the state or under the common law. The law of another state will not divest the trustee, assignee, or receiver of his right to the property should he take it into such state in the performance of his duty." In *Brownell v. Manchester*, 1 Pick. 233, it was held that a sheriff in the state of Massachusetts who had attached property in that state did not lose his special property by removing the attached property into the state of Rhode Island for a lawful purpose. An administrator who has obtained a judgment in his representative capacity in the domestic court has been allowed to maintain an action in his own name on the judgment in a foreign court, on the ground that the title to the judgment was vested in him. *Lewis v. Adams*, 70 Cal. 403; *Barton v. Higgins*, 41 Md. 539; *Cherry v. Speight*, 28 Tex. 503; *Rucks v. Taylor*, 49 Miss. 552. Our opinion is that the order of the court, and the subsequent possession thereunder in Mexico, vested in the plaintiff a special property in the car, and authorized him to maintain this suit for the recovery of the property, even against the claim of creditors of the United States.

2. The pleadings put in issue the jurisdiction of the court appointing the receiver. The only proof of the jurisdiction was the evidence of witnesses who had knowledge of the laws of Mexico, and of the proceedings of the courts of that country. This evidence showed that the district courts of Mexico uniformly exercised jurisdiction in the appointment of receivers, and in controlling the affairs of insolvent corporations, until the property could be sold and applied to the payment of the debts. It was not shown whether or not the jurisdiction of these courts was defined by statute, or was fixed by long-continued exercise of it. The record of the proceedings appointing plaintiff receiver of the Monterey & Mexican Gulf Railroad Company discloses the fact that the appointment grew out of attachment proceedings against the corporation, and the nomination of creditors, as provided by the

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commercial code of Mexico. It also appears, on the face of the record, that the duty of receivers and their powers are matters of statutory regulation. It is insisted by defendant that, as the record shows that the court is governed by statute law, the jurisdiction of the court to appoint plaintiff receiver could only be established by the statute itself. As plaintiff claims a right to the possession of the property solely by virtue of the judgment of a foreign court, it was incumbent on him to prove that the court had jurisdiction to confer the right upon him. The property belonged to the corporation for whose debt the car in question was attached. The attachment is valid, and the right of defendant, as sheriff, to hold the property is complete, unless plaintiff has shown a valid transfer, not only of the possession, but the right of possession, to himself, prior to the attachment. If the court had no jurisdiction to make the appointment, the judgment conferred no right upon the receiver. Greenleaf says: "In order to found a proper ground of recognition of a foreign judgment, * * * it is indispensable to establish that the court which pronounced it had jurisdiction over the cause." 1 Greenl. Ev. § 540; Taylor v. Insurance Co., 14 Allen 357. See, also, Kronberg v. Elder, 18 Kan. 150, in which it is held by BREWER, J., that one claiming a right as receiver must show that the court had jurisdiction to confer the right. What the laws of foreign countries are, when made an issue in a case, must be proved as other facts. If they are written, the laws themselves, or authenticated copies, must be produced. If they are not written, then they may be proved by the evidence of witnesses who are competent to testify on the question. Charlotte v. Chouteau, 25 Mo. 465; 1 Greenl. Ev., §§ 446-448; Pierce v. Indseth, 106 U. S. 551. If the jurisdiction of the district courts of Mexico is not defined by statute, we are of the opinion that the evidence offered by plaintiff makes, *prima facie*, sufficient proof of it to authorize the judgment. The fact that a foreign court uniformly exercises jurisdiction over a subject, in the absence of proof to the contrary, ought to be taken as evidence of the jurisdiction. That is about the only proof of which the fact is susceptible, except, probably, the written or published decisions of the court itself, if such should be in existence, of which there is no proof in this case. But defendant insists that the record of the judgment and decree of the court appointing and con-

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firming plaintiff as receiver shows upon its face that the court is governed by statute laws, and therefore the laws themselves should have been produced. A careful examination will show that references to a code and to the commercial law apply to the matter of procedure in court rather than the jurisdiction of the court. We are not concerned, in this collateral proceeding, about how the receiver was appointed, or what his duties are under the statutes of Mexico. If the court had jurisdiction to appoint him, the judgment itself affords at least presumptive evidence that the proper steps were taken. Greenl. Ev., § 541; Pelton v. Platner, 13 Ohio 217. The judgment is affirmed.

ROBINSON, J., concurs. BARCLAY, J., concurs in conclusion. BRACE, C.J., absent.

STRITESKY *et al.*

v.

CITY OF CEDAR RAPIDS.

(*Supreme Court of Iowa, May 20, 1896.*)

Street Railway Company Liable for Damages caused by Change of Grade.—A street railway company which has been granted the right of laying a track through a street is liable to the owners of abutting property for damages caused to such owners by laying a track on a grade which has been established by an ordinance of the city, but to which the surface of the street has never been raised, in the absence of express provisions authorizing it to do so.

APPEAL from district court, Linn county; J. H. PRESTON, Judge.

Plaintiffs, the owners of lots 4 and 5, in block No. 13, of Carpenter's Second addition to the city of Cedar Rapids, bring this action to recover damages to their said property by reason of a claimed change in the grade of the street in front thereof. It appears that in 1875 the city passed an ordinance duly establishing a grade on the street upon which said lots abut; that the improvements upon said lots were made to conform to said grade, which was practically the same as the

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then surface of the street. In September, 1886, the city duly passed another ordinance establishing a new and different grade, which provided for the raising of the grade in front of said lots about three feet higher than that heretofore established. The city never took any steps to assess or ascertain the damages to plaintiff's property by reason of such change of grade, and never in fact changed, or authorized any one to change, the grade of said street in front of plaintiff's said lots, unless the authority given the street-railway company should be held to have that effect. . In October, 1891, the Cedar Rapids & Marion City Railway Company was granted the right to " enter upon and construct, maintain and operate a single or double track railway, with the necessary turnouts and switches, upon " the street in front of plaintiffs' lots and other streets. Said ordinance also provided: " The company, its successors or assigns, shall, at its own cost and expense, keep in good repair that portion of the paving of such streets and highways as is now paved, which is included between the rails over which the cars pass, and one foot outside of the same on either side, but not between the two inside rails where a double track is used, except for the distance of one foot on either side as aforesaid, and shall immediately, at its own cost and expense, pave the portion of the streets included between the rails of each track, and one foot outside of the same on either side, on all streets and avenues which may at any time be paved or ordered to be paved by said city council, and the manner of laying such paving and the materials used shall be in accordance with the specifications furnished by the city engineer of said city." " During the construction and operation of said railway said company, its successors or assigns, shall not unnecessarily impede the public travel on any of the streets or highways aforesaid, and shall leave all streets and highways and bridges upon which it may enter for the purpose herein authorized, in as good condition as they were at the date of said entry." " Sec. 6. The said company, its successors or assigns shall hold the city harmless of any and from any and all causes of action, liabilities and damages, caused or accruing through or by reason of the construction and operation of said railway." By section 7 of the ordinance it is provided that the rights and franchises granted are subject to the right of the city " to change and alter the grade of any street and to make all other necessary and

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expedient street improvements, * * * and upon the change or alteration of any grade the said company, its successors or assigns, shall at its own cost and expense, properly raise or lower its tracks so as to conform to such grade as changed." It is averred that said railway company entered upon the street upon which plaintiff's property abuts, "and in a careless and negligent manner filled in and created a permanent embankment along the centre of said street about ten or twelve feet wide and to the height of about three feet above" the 1875 grade, and constructed its railway thereon, ruining said street as a thoroughfare and as a means of ingress and egress to and from plaintiff's premises, and creating a dam for surface water, throwing the same upon plaintiffs' premises, seriously impeding travel; by reason of which acts it is claimed plaintiffs' premises have been damaged in actual and rental value, and by reason of which plaintiffs have been compelled to raise their buildings and to fill in their said lots at great expense. The city answered, admitting its corporate capacity, the passage of the ordinance referred to, the construction of the road under the ordinance, that no steps were taken to assess or pay plaintiffs any damages, and denies all other allegations of the petition. A trial was had to a jury, and on motion of the defendant a verdict was returned for it, on which judgment was entered. Plaintiffs appeal. Affirmed.

Rickel & Crocker, for appellants.

Warren Harman, for appellee.

KINNE, J.—This case was determined in the court below upon the theory that the city was not liable for the acts of the street-railway company which are complained of. While several questions are argued, the real question is as to the liability of the city. If we shall reach the conclusion that it is not liable, it will not be necessary to consider the other questions discussed by counsel. It is to be remembered that the city never in fact changed the surface of the street in front of plaintiffs' premises so as to make it conform to the ordinance of 1886; indeed, it never took any steps to enforce the provisions of that ordinance. As the city had made no attempt to change the physical surface of the street, and make it conform to the grade established in 1886, the plaintiff is in no situation to complain unless the acts of the railway company are to be treated as the acts of the city. *Preston v.*

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City of Cedar Rapids (Iowa), 63 N. W. 580. The real question is, does the ordinance granting the right to the street-railway company to enter upon streets and lay its tracks require the company to lay its track in conformity to the 1886 grade? We discover nothing in the ordinance making any such requirement. Counsel for appellants admit that the ordinance does not in terms so require. They insist, however, that such is its fair import. The claim is grounded upon the fact that in the ordinance the city reserved the right to change or alter the grade of streets, and the company was required to promptly conform to such changes as made. Now, while it is true that the grade of 1886 superseded that of 1875, still, as we have said, so long as the city took no steps to conform the then surface of the street to the 1886 grade, there was no damage for which plaintiff could recover. Had the ordinance granting the right to the street-railway company in terms required it to construct its road in conformity to the established grade, the case would be ruled by Preston's Case; but it did not do so. The railway company could not, in the absence of express authority from the city, determine for it when the surface of the street, as it then existed, should be made to conform to the new grade. The city had not vested any such power in the street-railway company, and until it did so it could not be liable to a lot owner for an unauthorized act of the railway company which caused damages to him. Preston's Case is much relied upon by appellant. In that case plaintiff petitioned the city to make certain improvements in front of his property, and it was held he must have contemplated that they would be made on the then established grade. In this case the city authorizes the railway company to occupy certain streets, and to lay its tracks thereon. Now, in the absence of express provision authorizing it, can it be said that the city thereby impliedly authorized the company to do that which the city had not as yet itself determined to do? The case in its facts is quite different from the one relied upon. The city did not, either expressly or impliedly, undertake to make the street-railway company its agent to raise the grade of the street in front of plaintiffs' premises to conform to the ordinance of 1886. If the company did so, it acted at its own instance, and is liable for any wrongful act which has produced damage. The case of McKillop v. Railway Co., 53 Minn. 532, is in support of our holding. Affirmed.

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NELLING

v.

CHICAGO, ST. P. & K. C. R. CO.

(Supreme Court of Iowa, May 26, 1896.)

Persons on Track—Duty of Engineer.—Where a hand car is manned by section hands familiar with the running of the trains, the engineer of a train following it is justified in supposing that the section hands have performed their duty in being on the watch for the train, and are aware of its approach, and he is not obliged to attempt to stop the train until it is evident that they do not know of its approach, and are not likely to clear the track in time for its passage.

Proximate Cause.—Where a section hand who is on a hand car with other section hands who jumped from the car on the approach of a train and escaped injury, while he remained to remove the car, after seeing the train in sufficient time to have avoided the injury, and was killed, his action in attempting to remove the car was the proximate cause of his death.

GIVEN, J.—At the close of the evidence, the court below sustained defendant's motion for a verdict, and plaintiff appealed. On the former submission, the action of the district court was affirmed. See 63 N. W. 569. A rehearing was asked, upon the ground that under the rule announced in *Meyer v. Houck*, 85 Iowa 319, the questions of negligence should have been submitted to the jury, and especially the question of defendant's negligence after the peril of deceased was known. It is contended that it is the province of the jury alone to pass upon the credibility of the witnesses, and the preponderance and weight of the evidence; and that, where there is any conflict in the evidence, the court may not sustain a motion for a verdict. In *Meyer v. Houck* this court announced the rule as follows: "Our conclusion is that, when a motion is made to direct a verdict, the trial judge should sustain the motion, when, considering all of the evidence, it clearly appears to him that it would be his duty to set aside a verdict if found in favor of the party upon whom the burden of proof rests." In this case there is no real or substantial conflict in the evidence as to the material facts.

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All agree that the whistle was sounded; but Mr. and Mrs. Turner, who were 40 or 50 rods away, say they did not hear all the signals which the engineer and fireman say were given,—a fact that may be accounted for by the prevailing wind. Surely, there is no contradiction in this evidence. The engineer and fireman place the speed at 18 to 20 miles per hour, while Mr. Turner gives it as his opinion that it was 20 to 30 miles per hour. There was no material conflict in these expressions of opinion. Of the four men present, and who alone could know the fact, three testify that the deceased attempted to remove the hand car from the track, while the other shows that he was in such a dazed condition as not to have observed this fact. We think there can be no dispute as to the controlling facts of the case, and that, therefore, even under appellant's contention as to the rule, the court was warranted in sustaining the motion for verdict, if it clearly appears that the evidence would not sustain a verdict in favor of the plaintiff. After a careful review of the case, we adhere to the opinion that the evidence fails to show negligence upon the part of the defendant's employees prior to the time that they had reason to believe the deceased was in peril, and does show negligence upon the part of the deceased.

Among the many charges of negligence, appellant alleged that the defendant's employees were negligent "in failing to stop said train when they saw that deceased was in such a dangerous position." It was especially urged that a rehearing should be granted to the end that this charge might be further investigated. As the negligence, if any, in this respect, must be chargeable to the engineer, our inquiry is mainly as to his conduct. He must be held to have known all the facts touching his control over the movement of that train, and the presumption as to the conduct of the deceased upon which he had a right to act. It was the duty of the deceased to watch for trains, and, from where he was, this train could have been seen in ample time to have permitted the deceased and his men to clear the track. While, because of the velocity and direction of the wind, the engineer might not assume that the signals given were heard, he had a right to proceed upon the assumption that deceased had performed his duty in watching for trains, and, therefore, knew of the approach of this one. He was under no obligation to either check or stop his train until it was reasonably apparent to him

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that, from any cause, the deceased and his men were not likely to clear the track in time for the passage of the train. Knowing, as he did, that these men were on the track, as they were, it was his duty to observe them closely, and, the moment he had reason to believe that they were not going to leave the track in time to avoid danger, to then promptly use the appliances at his command to check or stop the train, so as to avoid injury to the men. Calculations of time and distances are made in argument to show that the engineer should have stopped the train before it reached the point of the accident, but this reasoning leaves out of consideration the right that the engineer had to believe, until the contrary appeared, that the approach of the train was known by the men, and that the track would be cleared in time for its passage. It proceeds upon the theory that it was the duty of the engineer to check or stop his train as soon as he saw the men on the track, but such is not the rule of care required. He was not required to check or stop the train until it was reasonably apparent that, from any cause, the men were not likely to clear the track in time to allow the train to pass at unchecked speed; and it was not until that moment that the duty devolved upon the engineer of using the appliances at his command to avoid the accident. The evidence shows without conflict that from the moment the engineer thought the men were not aware of the approach of the train, and were not likely to leave the track in time to allow the train to pass at unchecked speed, he promptly used every appliance at his command to stop the train.

It is insisted that, as the train was not stopped in time to avoid the accident, the engineer was negligent in not sooner concluding that the men were in peril. It is clear that, if the men had known of the approach of the train at the time the engineer used the appliances to stop it, they could have removed the hand car, and cleared the track for the passage of the train. Therefore, we think it cannot be said that the engineer was negligent in not sooner concluding that the men were in danger unless the speed of the train was checked. If it be true that the engineer was negligent in not sooner concluding that the men were in danger, yet that negligence was not the proximate cause of the injury. As already stated, of the four persons who alone could know the fact, three testify that the deceased tried to get the hand car off the track, while

the other did not observe that fact. There is no dispute, therefore, in the evidence but that the deceased was trying to move the hand car from the track at or immediately before it was struck, and that, had he not done so, he could have gotten out of danger, as the two other men did. Much as men are to be commended for efforts to save life and property, it seems to us that, under the circumstances, this act of the deceased was unquestionably negligent, and was the proximate cause of his death. There was but a moment of time between the act of the deceased and the accident; therefore, no opportunity for the engineer to have avoided the accident after this negligent act of the deceased became known to him. Whatever the negligence of the engineer may have been in not giving signals, or in not sooner checking or stopping the train, it is, we think, entirely clear that the immediate cause of the decedent's death was his own negligence in attempting to remove the hand car, for it is certain that if he had left the track when he first knew of the approach of the train, as the two other men did, he would have escaped injury. We have given the case the careful examination that its importance demands, and again reach the conclusion that there was no error in directing a verdict for the defendant. Affirmed.

KINNE and DEEMER, JJ., dissenting.

NOTES

1. Employees on Track—In General.—The general rule is that, as to persons lawfully upon the track engaged in labor, the railroad company owes a duty of *active* vigilance, and such persons have a right to become engrossed in their labor to such an extent that they may be oblivious to the approach of trains—relying, as they may, upon the duty imposed by law with reference to them. *Gessley v. Missouri Pac. R. Co.*, 32 Mo. App. 413; *Shoner v. Pennsylvania Co.*, 130 Ind. 170; *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, *distinguishing* *Pennsylvania Co. v. Stoelke*, 104 Ill. 201; *Pennsylvania Co. v. Hankey*, 93 Ill. 580; *Dick v. Indianapolis, etc., R. Co.*, 38 Ohio 389, 8 Am. & Eng. R. Cas. 101.

Where workmen are placed upon the track by a railroad company to do work, the company must be as to them actively vigilant. *Baltimore, etc., R. Co. v. State*, 33 Md. 542; *McWilliams v. Detroit Cent. Mills Co.*, 31 Mich. 274; *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461; *Haley v. New York Cent., etc., R. Co.*, 7 Hun (N. Y.) 84; *Stinson v. New York Cent. R. Co.*, 32 N. Y. 333; *Ominger v. New York Cent., etc., R. Co.*, 4 Hun (N. Y.) 159; *Pennsylvania Coal Co. v. Conlan*, 101 Ill. 93, 6 Am. & Eng. R. Cas. 243.

Such persons have a right to become engrossed in their employment and to expect that care and pains will be taken as to them. *Schultz v. Chicago, etc., R. Co.*, 44 Wis. 638; *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461. But see *Besel v. New York Cent., etc., R. Co.*, 70 N. Y. 171; *Valtez v. Ohio, etc., R. Co.*, 85 Ill. 500.

Plaintiff's intestate was a track hand, and was killed by a passing train. It appeared that he had a right to be on the track at the time; that his life could have been saved by the use of ordinary care by those operating the train, and they failed to exercise such care. Those in charge of the train saw him on the track, and saw that his attention was directed to other matters at the side of the track, but they failed to give any signal. *Held*, that it was not error to refuse to instruct the jury that the company was not liable. *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113, followed in *Pope v. Kansas City Cable R. Co.*, 99 Mo. 400, 43 Am. & Eng. R. Cas. 290.

Side Track.—Where a railroad employee, engaged in removing ashes, etc., from a side track in depot grounds, was injured by a train set off upon said track,—*held*, that he had a right to act upon the belief that such train would be operated and run through the grounds as other trains had been uniformly operated and run there; and where there was proof that the bell was usually rung before starting a train at that place, and no proof that trains were run there habitually at an unlawful speed, and there was evidence tending to show that the train in question was run at an unlawful speed, and without ringing the bell at starting or giving the plaintiff other warning, the question of defendant's negligence was for the jury. *Schultz v. Chicago, etc., R. Co.*, 44 Wis. 638, 18 Am. Ry. Rep. 146.

Risks of Employment.—The fact that the deceased, when he engaged in the company's service, assumed the risk of injuries from the negligence of his co-employees, did not relieve the engineer of the duty of looking out for and avoiding injury to deceased. *Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87.

Grading New Track.—The plaintiff and others were lawfully, and with defendant's knowledge, engaged in grading for a new railway track alongside of and parallel to defendant's original or main track. The ordinary duties of the work frequently required them to be in such close proximity to defendant's original track as to be liable to be struck by passing trains. It had been the uniform practice of those operating trains on the railroad to give these workmen warning of their approach by signals. *Held*, that the defendant owed the workmen the duty of active vigilance in giving them proper signals of the approach of trains, and that they had, under the circumstances, the right to rely on the continued performance of this duty, without the necessity, while engrossed in their work, of themselves keeping a constant lookout for approaching trains. The duty of defendant in this respect would be the same whether the workmen were in its employment or in that of its contractor. It would not ordinarily be the duty of those operating a train to stop it or slack its speed, provided they gave the proper signals. They would

have a right to presume that the workmen would heed the warning, and remove from the place of danger. But if the trainmen saw that they did not hear the signals, and were making no effort to escape, it would then be their duty to stop the train, if there was still time to do so, before injuring them. *Erickson v. St. Paul, etc., R. Co.*, 41 Minn. 500.

A Track Repairer, while at work at a place where there were many tracks, was injured by a backing train, which approached without signals and without any one on the end of it to keep a lookout, as was required by a city ordinance. *Held*, that the injured party might recover. *Kelly v. Union R., etc., Co.*, 95 Mo. 279, 35 Am. & Eng. R. Cas. 396.

Duty to Stop Train.—Where an engineer signals the approach of his train, but afterward sees that men working on the track have not heard the signal, and are making no effort to leave the track, it is his duty to stop the train if he can do so in time to avoid a collision. *Erickson v. St. Paul, etc., R. Co.*, 41 Minn. 500.

Brakeman.—A train broke in two at night and a brakeman was sent forward to signal the engineer, who was running back in search of the missing cars, but the brakeman went to sleep and was injured. *Held*, that it was not the duty of the engineer to keep a sharp lookout for the brakeman under such circumstances; and the company would only be liable for injuries which might have been avoided by the exercise of proper care after the brakeman was discovered. *Newport News, etc., Co. v. Howe*, 52 Fed. Rep. 362. Following *O'Keefe v. Chicago, etc., R. Co.*, 32 Iowa 467; *Yarnall v. St. Louis, etc., R. Co.*, 75 Mo. 575; *Denman v. St. Paul, etc., R. Co.*, 26 Minn. 357; *Button v. Hudson River R. Co.*, 18 N. Y. 248. *Reviewing Inland, etc., Coasting Co. v. Tolson*, 139 U. S. 551.

2. Running into Hand-car.—Where a railroad employee starts over the road on a hand-car that is to be followed by an engine, according to the statement of the engineer to him, in about fifteen minutes, whereas it is actually started in less than ten minutes, and run at a higher rate of speed than necessary, and collides with the hand-car while going around a curve where the hand-car could not be seen more than 125 feet ahead, and the conductor and engineer both either know, or might easily ascertain, that the hand-car is ahead, and the employee is injured, the railroad company will be liable. *Hawley v. Chicago, etc., R. Co.*, 71 Iowa 717.

Plaintiff's intestate, a trackman, was killed while operating a hand-car. The section boss had sent a signal flag by one of the trainmen to meet an approaching train. The train-hands, having failed to keep a lookout, ran into the hand-car before the trackman could get out of the way, and intestate was killed. *Held*, that the death of the intestate was caused by the negligence of those in charge of the train. *Howard v. Delaware, etc., Canal Co.*, 40 Fed. Rep. 195, 41 Am. & Eng. R. Cas. 473. Following *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.) 90.

A section hand was injured while riding on a hand-car by colliding

with a train. *Held*, that the company was not chargeable with negligence where it appeared that those in charge of the train made every reasonable effort to stop it after they knew that they were approaching the hand-car. *Chicago, etc., R. Co. v. Peterson*, 32 Ill. App. 139.

Injuries to Section-hands—Extra Trains.—When it is the practice of a railroad company, of which a section-hand has knowledge, to run extra trains without notice, and it is the duty of one of the gang to be always on the lookout therefor, the section-hand assumes the risk of accidents from the running of such trains. *Pennsylvania R. Co. v. Wachter*, 60 Md. 395, 15 Am. & Eng. R. Cas. 187; *International, etc., R. Co. v. Hester*, 64 Tex. 401, 21 Am. & Eng. R. Cas. 535; *Olsen v. St. Paul, etc., R. Co.*, 38 Minn. 117, 33 Am. & Eng. R. Cas. 386. The service contracted to be performed by a section-hand is of such a nature as to embrace within its scope dark and cloudy as well as clear weather, and he assumes the risk of accident arising therefrom. *International, etc., R. Co. v. Hester*, 64 Tex. 401, 21 Am. & Eng. R. Cas. 535. Where a section-hand voluntarily and without protest mounts a hand-car and rides upon it, and he has the same opportunities for ascertaining the whereabouts of a belated train as the foreman of a gang, the railroad company is not liable for injuries resulting in his death. *Railway Co. v. Leech*, 41 Ohio St. 388. So, too, where the deceased rode upon a hand-car knowing that flags had not been sent out in advance or other precautions taken, and had knowledge of a rule permitting the despatch of special trains without signalling in advance, he accepted the risk of such un-signalled special train, and no recovery could be had. *McGrath v. New York, etc., R. Co.*, 14 R. I. 357.

In Massachusetts, where the courts hold that section-men are fellow-servants of the section-boss and the engineers of special trains, no recovery can be had for personal injuries caused by a collision between a hand-car and a locomotive, if the accident was occasioned by the negligence of the section-boss and the engineer. *Clifford v. Old Colony R. Co.*, 141 Mass. 564. But in West Virginia, where it is held that a section-foreman is not the fellow-servant of a section-hand who is subject to his orders, the company is liable in damages for injuries caused through the negligence of the foreman in failing to avail himself of an opportunity for ascertaining when extra trains will be run. *Criswell v. Pittsburgh, etc., R. Co.*, 30 W. Va. 798, 33 Am. & Eng. R. Cas. 232. As to whether trackmen and trainmen are fellow-servants, see note 41 Am. & Eng. R. Cas. 477; 5 Rap. & Mack, 737, 738, 744; 1 Am. & Eng. Encycl. 884.

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Hamlin v. New York, N. H. & H. R. Co.

HAMLIN *et. al.*

v.

NEW YORK, N. H. & H. R. CO. *et al.*

(*Supreme Judicial Court of Massachusetts, June 17, 1896.*)

Right of Way—Crossing.—A right of way over his land was conveyed to a railroad company, the conveyance requiring the construction of a suitable crossing by the company. In the location subsequently filed by the company, the crossing was shown by the dotted line enclosing the right of way, and it was stated that the land taken was for the greater part of the way a certain width, but there was nothing therein to show an intention of abrogating the crossing. *Held*, that the land-owner's right to a crossing was not extinguished by the location.

New Location of Right of Way does not Extinguish Crossing.—The filing of a new location of the road of a railroad as it existed at a certain time does not operate to extinguish a private crossing which existed at said time.

APPEAL from Suffolk county supreme judicial court.

Benton & Choate, for appellants.

Robert M. Morse and *Marcus Morton*, for appellees.

BARKER, J.—The defendants have appealed from a final decree restraining them from interfering with the use of a way across the Old Colony Railroad. The railroad was built with a single track by the Old Colony Railroad Corporation in the year 1845. The charter (St. 1844, c. 150) was enacted March 16, 1844. The original location in Norfolk county was filed April 16, 1846, and shows a location four rods wide at the point in question. By St. 1848, c. 84, the corporation was authorized to take additional land not exceeding 20 feet in width on either side of the railroad for the purpose of building a second track, and the second track was commenced in the same year. The corporation became the Old Colony & Fall River Railroad Company by union with the Fall River Railroad Company, under St. 1854, c. 133. The location of the Old Colony & Fall River Railroad Company was confirmed by St. 1858, c. 171, § 5, enacted March 27, 1858; and the corporation was authorized by the same section to file, at any

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time within one year, new descriptions of the whole or any part of its location, as the same existed on March 27, 1858, and such a document was filed in Norfolk on March 21, 1859. When the charter of 1844 was granted, Luther Spear owned in one tract the land to which the way is appurtenant, the adjoining land now occupied by the railroad, and the land on the opposite side of the railroad. On January 27, 1845, he sold to the railroad corporation the strip of his land on which the railroad was built, saying in his deed: "The said corporation is to make a suitable road crossing within two years from date of deed." In October, 1854, there was a transaction between him and the Old Colony & Fall River Railroad Company, in which, by a deed reciting that, at the time of the laying out and construction of the railroad, he was the owner of a tract of land across which the railroad was constructed, dividing his land into two separate parts, and that he had used certain ways or rights of way, passages, and crossings, he released to the company all of the ways, rights of way, passages, and crossings; and by a deed to him, found by the presiding justice to be part of the same transaction, the company conveyed to him and his heirs and assigns a right of way over the company's land and railroad at the place where the way in question is. The recitals of the deeds justify the conclusion that the occasion for this transaction was the recent construction by the railroad company of a bridge over its railroad at a point near Spear's northern boundary, and that the transaction was a substitution of a crossing situated at the southern boundary of his land for other ways, rights of way, passages, and crossings over the railroad between the parts of Spear's land, and which up to that time he had used under claim of right. The deed of the company recites that it had laid, and was to keep in repair, a plank covering on the crossing. The evidence tends to show that this substituted crossing remained in use until within less than 20 years before the filing of the bill, and that it had been obstructed and closed by the defendants within 20 years. The defendants contend that the right of way left in Spear by his deed of January 27, 1845, was extinguished by the location filed in Norfolk on April 16, 1846; that the transaction of October, 1854, was, in effect, a sale for private uses of property taken by the railroad corporation for public purposes, and beyond the power of the corporation; and that it gave no right of way across the railroad. They

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further contend that the location filed in Norfolk on March 21, 1859, extinguished all rights of way at the crossing mentioned in the transaction of October, 1854, if any such rights existed on March 21, 1859.

It is not contended that the deed of January 27, 1845, left in Spear a permanent right of way. Assuming, as was held in *Googins v. Railroad Co.*, 155 Mass. 505, that, in general, when land is taken for a railroad, and no right of crossing is reserved in the location, the land taken is not subject to such a right, we are of opinion that the location of April 16, 1846, might be found in fact to have recognized Spear's right of way by indicating it by the dotted line crossing the red line, which shows the center of the single track at the place on the plan marked "Spear." See *Humphreys v. Railroad Co.*, 160 Mass. 323. The location describes the center line for a single track, and states that "the width of land taken is most of the way four rods,—two and one-fourth rods on the easterly, and one and three-fourths rods on the westerly, side of the center line." There is nothing in the language to show an intention to abrogate the crossing which, by accepting the deed of January 27, 1845, the corporation had agreed to make between the separated portions of Spear's land, any more than to show an intention to extinguish as ways the other roads or the navigable streams across which the location went. In the absence of any such language, and in consideration of the situation of the parties, the location of 1846, with the plan which is part of it, should, if possible, be construed, not as extinguishing, but as recognizing and affirming, the right which Spear then had to cross the railroad from one part of his land to the other, and which he continued to exercise, and which formed the subject of his transaction of October, 1854, with the railroad corporation. It is unnecessary to consider whether a railroad corporation has power to sell to an owner of lands adjoining its railroad a right of way across the railroad. The transaction of October, 1854, may well have been found a substitution of the right to use a particular crossing for the right to use other crossings in the vicinity, and to have been a transaction not detrimental to, but in aid of, the use for which the railroad corporation had taken the land. Its land being subject to an easement in favor of Spear's land, the parties could lawfully adjust and fix the rights and obligations of the dominant and servient lands, as

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they did in the transaction of October, 1854, by extinguishing all other rights and claims, and establishing one permanent crossing in lieu of them. The considerations above applied show that the crossing granted and made permanent by the transaction of October, 1854, was not necessarily extinguished by the location of March 21, 1859. The language of that location contains no mention of the crossing, and no statement that the corporation takes or extinguishes the right to use it. The plan which is part of the location shows not only a red line, which we assume to be coincident with the red line of the location of 1846, but also the side lines of the railroad land, and bounds and distances. At the place upon the plan where the present crossing would be located are lines running to the outer lines of the railroad land, which may indicate the crossing in the way in which public roads are shown upon the plan, and may denote that it was the intention to recognize, and not to extinguish, the crossing. Besides this, the only right which the corporation had on March 29, 1859, to file a new general location of its railroad was that given by St. 1858, c. 171, § 5, and was merely to file new descriptions of the whole, or any part, of its location, as the same existed on March 27, 1858, when its location was confirmed by the statute cited. See St. 1844, c. 150, §§ 1, 7; St. 1848, c. 84; St. 1854, c. 133; St. 1858, c. 171, § 5; also, Rev. St., c. 39, §§ 54, 55, 73-75; St. 1846, c. 97; St. 1853, c. 351; St. 1854, c. 417. The location of the Old Colony & Fall River Railroad Company as it existed on March 27, 1858, was a location subject to the right of way at the crossing now in question, and that right could not be extinguished by a location filed only in pursuance of the permission given by St. 1858, c. 171, § 5. Decree affirmed, with costs.

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LOUISVILLE & N. R. Co.

v.

HARTWELL.

(Court of Appeals of Kentucky, June 12, 1896.)

Right of Consignor to Make Delivery of Goods Conditional.—Where a shipper has delivered goods to a carrier, and has received a bill of lading, if the bill of lading has not been forwarded to the consignee, or some one to his use, the shipper may condition the delivery of the goods to the consignee on the payment of a draft by such consignee.

Presumption as to Ownership of Goods Delivered Conditionally.—In such a case the presumption no longer obtains that the consignee is owner of the goods.

Proof of Value.—In such a case it is essential that there should be proof of the value of the consignment in an action by consignor. It is not sufficient that the bill of lading is for a sum certain.

Damages Not Assessed in Verdict—Power of Court to Render Judgment.—Where the code provides that the jury must assess the amount of recovery, the court is not authorized to render a judgment on a verdict in which the jury fail to assess the amount of the recovery.

APPEAL from Hardin county circuit court.

W. H. Marriott, for appellant.

R. L. Stith and *S. H. Bush*, for appellees.

PAYNTER, J.—On the 9th of September, 1892, Hartwell delivered to the appellant for shipment to A. Pennington & Co., of St. Louis, Mo., 170 barrels of apples, for which he received from it a bill of lading. On the day following, Hartwell made a draft in favor of the First National Bank of Elizabethtown, Ky., on the consignees, A. Pennington & Co., for \$300, and at the same time delivered to it the bill of lading. He then notified the appellant not to deliver the apples to the consignee unless he presented the bill of lading and paid the draft which he had drawn in favor of the bank. In violation of Hartwell's order, the appellant delivered to A. Pennington & Co. the apples, without requiring them to present the bill of lading and pay the draft. The bank gave Hartwell credit for the draft, but, Pennington & Co. failing

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to pay it, this action was brought to recover the amount of it of the appellant. The answer denied that Hartwell was the owner of the apples, and alleged that they were owned by Pennington & Co. The shipper of goods may, even after the delivery to the carrier, and after the bill of lading has been signed and delivered, alter their destination, and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee, or some one for his use. However, this would not be the case if a state of facts existed which made the delivery of the goods to the carrier a delivery to the consignee and the owner of them only (Hutch. Carr. [2d Ed.] § 134); while the consignee in the bill of lading is presumptively the owner of the goods, and must be treated by the carrier as the owner, unless he has notice to the contrary. When goods are shipped deliverable to the order of the consignor for and on account of the consignee, the carrier cannot deliver them to such consignee except upon the production of the bill of lading, properly indorsed by the consignor. When the goods are thus shipped and deliverable, the carrier must take notice that the consignor intended to retain control of the disposition of the goods. *Id.* § 130. So, when the shipper gives notice, after they have been received by the carrier for transportation, and before they are delivered to the consignee, that he is not to deliver them to the consignee, he must take notice that the consignor intends to retain control of their ultimate disposition. After such notice the presumption no longer obtains that the consignee is the owner of the goods. Bills of lading are consignable. When properly indorsed, and delivered with the intention of passing the title to them, it is a constructive delivery of the goods. *Id.* § 129. In the same way they could be pledged to pay a debt, and thus give the assignee control of the goods. There was no proof as to the value of the apples. It was essential that such proof should have been made before there could be a verdict and judgment for the plaintiffs. Civ. Code, § 126, subsec. 4. Unless they had a value, the appellant could not have been damaged, except nominally, on account of the delivery of the apples to Pennington & Co. It cannot be said, because the draft was for \$300, therefore the apples were of equal value, and that there is an implied obligation on the part of the railroad company to pay that amount. The company can only be made to pay the bank such damages as

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it sustained, not exceeding in amount the value of the apples, but in no event more than the \$300. Section 329, Civ. Code, provides that, "if by a general verdict either party be entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery." In this case the verdict must be general, and, if anything, the plaintiffs were entitled to recover money of the defendant. The court failed to tell the jury that if they found for the plaintiffs they should assess the amount of recovery, and the jury did not fix it. The verdict is as follows: "We, of the jury, find for the plaintiffs." Although there had been proof as to damages, the court was not authorized to render a judgment on the verdict, because the jury had failed to assess the amount of recovery. The testimony of Givens and Talbot in rebuttal should have been given in chief. The judgment is reversed for further proceedings in conformity with this opinion.

MISSOURI, K. & T. R. Co.

v.

COOK *et al.*

(163 U. S. 491.)

Rights of Third Persons.—A grant of public lands provided that as soon as the company should file with the secretary of the interior maps of its line designating the route thereof it should be the duty of said secretary to withdraw the lands granted from the market. *Held*, that, when a line was surveyed for the route of the railroad by the chief engineer of the company, and a map filed, the route was definitely fixed, and could not be changed by the company so as to affect the rights of third parties who had in the meantime lawfully entered upon other lands.

IN error to the supreme court of the state of Kansas.

This was an action of ejectment brought by the Missouri, Kansas & Texas Railway Company, a corporation of the state of Kansas, and the Missouri Pacific Railway Company, a corporation of Missouri, in the district court of Labette county, Kan., August 17, 1887, against J. B. Cook and L. H. Printz, to recover possession of certain real estate situated in the city

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of Chetopa, in that county, and described in the petition. Defendants filed a general denial. The case was tried by the court on an agreed statement of facts, and judgment rendered for defendants. Plaintiff thereupon took the case on error to the supreme court of Kansas, by which the judgment of the district court was affirmed. *Missouri, etc., R. Co. v. Cook*, 47 Kan. 216. Thereupon a writ of error was taken out from this court.

The agreed statement was as follows:

“(1) The Missouri, Kansas and Texas Railway Company was on the 25th day of September, 1865, duly organized as a corporation under the name of the Union Pacific Railway Company, Southern Branch; and on the 3d day of February, A. D. 1870, its name was duly changed, and made the Missouri, Kansas and Texas Railway Company, and it is the railway company referred to in the act of congress approved July 26, 1866, entitled ‘An act granting lands to the state of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas.’

“(2) The acceptance of the terms, conditions, and impositions of said act by the said Union Pacific Railway Company, Southern Branch, was signified in writing, under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance was made and deposited with the secretary of the interior within one year after the passage of said act.

“(3) The land in the petition described is a part of the lands known as the ‘Osage ceded lands,’ granted to the United States by the treaty between the United States of America and the Great and Little Osage Indians, proclaimed January 21, 1867.

“(4) Prior to the 24th day of December, 1867, a line was surveyed for the route of said railroad by G. M. Walker, then chief engineer of said company, which was the line from which the lands mentioned in stipulation No. 7 herein were withdrawn from market; but that line did not touch the southwest quarter of section thirty-four (34), township thirty-four (34), range twenty-one (21), which includes the land described in plaintiff’s petition in this case; and afterwards, and between May 1, 1870, and June 6, 1870, said company located its road on the line where now operated, and built same in substantial

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compliance with said act of congress, but the route of said road on its present location has never been approved by the president of the United States, unless such approval is shown by the other facts herein admitted.

“(5) The premises in plaintiff's petition demanded lie wholly within one hundred feet of the center line of the main track of the railway so built and constructed as aforesaid, the center line of said main track being the center of the right of way of the railroad company.

“(6) On the first day of December, 1880, the said Missouri, Kansas and Texas Railway Company leased said railway to said Missouri Pacific Railway Company, which has since possessed and operated the same as such lessee.

“(7) Upon the completion of said railway through said Osage ceded land, the president of the United States issued to said Missouri, Kansas and Texas Railway Company patents under said act of congress approved July 26, 1866, for the alternate sections of land designated by odd numbers, to the extent of five alternate sections per mile on each side of said railroad, which are the same patents set aside in the case of *Missouri, K. & T. R. Co. v. U. S.*, reported in 92 U. S. 733, 760.

“(8) The quarter section, including the land in question, was entered and purchased by one W. A. Hodges, from the government of the United States, on October 9, 1869; and a certificate in due form was on that day, by the proper officers, issued to him therefor: and thereafter, and on November 1, 1870, a patent in due form was issued therefor, pursuant to the said entry, by the government of the United States to said patentee, Hodges, which was duly signed and executed; and a perfect chain of title from said Hodges, patentee, now runs to and terminates in said defendant J. B. Cook, and he is the owner thereof, unless the same is owned by plaintiff by virtue of the facts herein admitted and the law governing the same. Defendant Printz is in possession of the premises in controversy as the tenant of defendant Cook.

“(9) None of the land in dispute lies within fifty feet of the line of the center of the main track of said railroad, nor does defendant claim any part of the strip of land within fifty feet on either side of the center of said track.

“The plaintiff, at the time of constructing said road, erected a depot building on its right of way, and the land on

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which said building stands is adjacent to the land in dispute, which said depot has been used all the time since its erection for the purpose of receiving freight and passengers for shipment; nor does defendant claim any ground on which side tracks of said railroads are not located."

James Hagerman and T. N. Sedgwick, for plaintiff in error.
Nelson Case, for defendants in error.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

Plaintiff claimed the premises in question as a part of its right of way, under and by virtue of the act of congress approved July 26, 1866, entitled "An act granting lands to the state of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas" (14 Stat. 289).

By this act five alternate sections of land per mile on each side of the road were granted to the state of Kansas for the use and benefit of the railroad company; and in case it appeared that the United States had "when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purposes whatever," then other lands might be selected in lieu thereof: "provided, that any and all lands heretofore reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the president of the United States."

The fourth section read: "That as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of said secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

By the sixth section it was provided "that the right of way

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through the public lands be, and the same is hereby, granted to said Pacific Railroad Company, Southern Branch, its successors and assigns, for the construction of a railroad as proposed. * * * Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations."

The land in question was a part of the land ceded to the United States by the Great and Little Osage Indians, by the treaty proclaimed January 21, 1867 (14 Stat. 687).

From the statement of facts, it appears that prior to December 24, 1867, a line was surveyed for the route of the railroad by the chief engineer of the company, which was the line from which the granted lands were withdrawn from market, but that line did not touch the quarter section embracing the land described in the petition. The precise date of the filing of the map and profile of this survey does not appear, but this is not material.

In the instances of many of the land grants, the acts contemplated a preliminary designation of the general route by map filed in the department of the interior, upon which the lands were withdrawn, but the grants only took effect on a subsequent designation of the definite location of the line of the road. *Railway Co. v. Dunmeyer*, 113 U. S. 629; *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 57 Am. & Eng. R. Cas. 316. But this grant made no provision for any preliminary surveys and maps, and the only map provided for was that mentioned in section 4, being, as stated, a map of "its line designating the route thereof." We think that, by the filing of the map of the line surveyed, the route was definitely fixed, within the intent and meaning of the act; and, while the principal object in filing the map was to secure the withdrawal of the lands granted, it also operated, and could not otherwise than operate, to definitely locate the line and limits of the right of way. And this view is sustained by previous adjudications of this court.

By the act of congress of July 23, 1866, entitled "An act for a grant of lands to the state of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph" (14 Stat. 210), a grant of lands to the state of Kansas for the

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benefit of the St. Joseph & Denver City Railroad Company was made in substantially the same terms as those of the grant of July 26, 1866, under consideration.

In *Van Wyck v. Knevals*, 106 U. S. 360, 10 Am. & Eng. R. Cas. 664, this act came before this court for construction, and the rights of the parties depended on the time of the definite location of the road. *Knevals*, the complainant below, claimed through the company, and contended that the filing of the map with the secretary of the interior was the location of the road; and Mr. Justice FIELD, speaking for the court, said: "We are of opinion that the position of the complainant is the correct one. The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the secretary of the interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company, and a map designating it is filed with the secretary of the interior, and accepted by that officer, the route is established. It is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route." *Walden v. Knevals*, 114 U. S. 373. And this was in accordance with the ruling of Mr. Justice MILLER, on circuit, in *Knevals v. Hyde*, 6 Fed. Rep. 651.

The same conclusion necessarily followed in respect of the right of way. The grant of the lands and the grant of the right of way were alike grants *in præsenti*, and stood on the same footing; so that, before definite location, all persons acquiring any portion of the public lands after the passage of the act took the same subject to the right of way for the proposed road. The easement and the lands were afloat until, by definite location, precision was given to the grant, and they became permanently fixed. *Railroad Co. v. Baldwin*, 103 U. S. 426, 2 Am. & Eng. R. Cas. 510.

After the line had thus been definitely located, on October 9, 1869, the quarter section containing the real estate in controversy was entered at the government land office by W. A. Hodges, to whom the proper certificate was that day issued,

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under a resolution of congress approved April 10, 1869 (16 Stat. 55), in favor of *bona fide* settlers residing on any portion of the land acquired from the Osage Indians by the treaty proclaimed January 21, 1867. Between May 1 and June 6, 1870, the railroad company ran a second line, on which it built its road between those two dates, and entered into occupancy of a right of way 100 feet in width. This line ran something like a mile east of that of definite location, and through the quarter section in question; but none of the real estate in dispute lies within the right of way so occupied. On November 1, 1870, a patent was issued in due form to Hodges, pursuant to his entry; and defendant Cook (under whom defendant Printz was in possession as tenant) holds by a perfect chain of title from Hodges. The issuing of the patent shows that the land department had found the existence of all the conditions, such as actual occupancy of and residence on the premises and like matters, requisite thereto, and it took effect by relation as of the date of the certificate. It follows that, as the rights of the settler were acquired after the right of way of the road had been definitely located, he was not subject to any risk which others may incur who purchase while the location remains floating and uncertain, and he could not be deprived of rights which had thus attached by the subsequent action of the company; and his grantees stand in his shoes.

We need not consider what effect, if any, deviations of the kind in question might have upon the grant (*Van Wyck v. Knevals, supra*; 16 Ops. Attys. Gen. 457; 6 Land Dec. Dep. Int. 209); nor is it necessary to discuss the contention that a railroad company, by once locating its road, has exhausted its authority, and cannot relocate it on a new line without additional legislative permission so to do, or the effect of the statute of Kansas which allows railroad companies to change the location of their tracks. Whatever the rights of the company in this regard, such a change could not affect the rights of third parties which had in the meantime lawfully intervened. *Washington & I. R. Co. v. Coeur D'Alene R. & Nav. Co.*, 160 U. S. 77.

The inquiry does not arise as to how the railroad company acquired the 100 feet which it occupies for right of way. It may have been purchased, or acquired by condemnation or by gift. We dispose of the case on the ground that, on the

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record before us, the state courts did not err in holding that plaintiff was not entitled to recover the premises in controversy, which do not embrace the right of way actually occupied by the company.

Judgment affirmed.

TEXAS & P. R. CO.

v.

GENTRY *et al.*

(163 U. S. 353.)

Amount in Controversy.—Where a statute providing for recovery in case of death by wrongful act requires that the amount recovered be divided by the jury among the beneficiaries, it was held that it created but a single liability, and that the appellate jurisdiction of the supreme court of the United States is to be determined by the total amount recovered, and not by the share of any beneficiary.

Harmless Error.—An instruction that a point was not disputed was held harmless error where the evidence established the point beyond doubt.

Presumption as to Stop, Look, and Listen.—Where no one witnessed the death of deceased, the presumption is that he stopped, looked, and listened; and therefore an instruction that if deceased by looking or listening could have known of the approach of the engine and car in time to have kept off the track and prevented the injury to himself the jury should find for the defendant was improper.

IN error to the United States circuit court of appeals for the Fifth circuit.

John F. Dillon, for plaintiff in error.

R. C. Garland, for defendants in error.

Mr. Justice HARLAN delivered the opinion of the court.

This is an action to recover damages alleged to have been sustained by reason of the negligence of the defendant railway company, the present plaintiff in error, resulting in the death of Louis D. Gentry. It was brought in the circuit court of Dallas county, Tex., and was removed into the circuit court of the United States for the Northern district of Texas on the petition of the defendant, a corporation created under acts of congress.

Case stated

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The deceased left surviving him his mother, the plaintiff Mary A. Gentry, 75 years old, and dependent upon him for support; his wife, the plaintiff May Gentry, 26 years of age; and two children, the plaintiffs Olive Lee Gentry and Thomas M. Gentry, 6 and 2 years of age, respectively.

By the statutes of Texas, in force when the alleged injuries were received, it was provided:

“ Art. 2899. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: (1) When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, steamboat, stage-coach or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their servants or agents. (2) When the death of any person is caused by the wrongful act, negligence, unskilfulness or default of another.

“ Art. 2900. The wrongful act, negligence, carelessness, unskilfulness or default mentioned in the preceding article must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury.

“ Art. 2901. When the death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered.

“ Art. 2902. The action may be commenced and prosecuted, although the death shall have been caused under such circumstances as amounts in law to a felony, and without regard to any criminal proceeding that may or may not be had in relation to the homicide.

“ Art. 2903. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

“ Art. 2904. The action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all.

“ Art. 2905. If the parties entitled to the benefit of the action shall fail to commence the same within three calendar months after the death of the deceased, it shall be the duty of the executor or administrator of the deceased to commence

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and prosecute the action, unless requested by all of the parties entitled thereto not to prosecute the same.

“ Art. 2906. The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives. If the plaintiff die pending the suit, when there is only one plaintiff, some one or more of the parties entitled to the money recovered may, by order of the court, be made plaintiff and the suit be prosecuted to judgment in the name of such plaintiff for the benefit of the persons entitled.

“ Art. 2907. If the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate.

“ Art. 2908. If the defendant die pending the suit, his executor or administrator may be made a party, and the suit be prosecuted to judgment as though such defendant had continued alive. The judgment in such case, if rendered in favor of the plaintiff, shall be paid in due course of administration.

“ Art. 2909. The jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict.” Sayles' Tex. Civ. St.

There was a verdict in favor of the plaintiffs as follows:

“ We, the jury, find for the plaintiffs (\$10,166.66) ten thousand one hundred and sixty-six dollars and sixty-six cents, apportioned among plaintiffs as follows:

“ May Gentry, four thousand one hundred and sixty-six dollars and sixty-six cents.

“ Olive Lee Gentry, two thousand five hundred dollars.

“ Thos. M. Gentry, two thousand five hundred dollars.

“ Mary A. Gentry, one thousand dollars.”

Separate judgments were rendered in favor of each plaintiff for the respective sums awarded by the verdict, and for costs, for which execution was directed to issue.

A motion for a new trial having been made and overruled, the case was taken to the circuit court of appeals, and by that court the judgment of the circuit court was affirmed, with costs to the plaintiffs.

It was alleged in the complaint, and there was evidence

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tending to show (although this evidence was weakened by that introduced on behalf of the railroad company):

That the deceased was an engineer on the regular passenger train of the defendant running between Big Springs, in Howard county, Tex., and Toyah, in Reeves county, Tex., and was paid for the number of miles actually run by him as such engineer.

That he had brought his train into Big Springs from Toyah about 6 o'clock on the morning of March 13, 1890, and was off duty that day, the schedule time for his going on duty again being 25 minutes past 9 o'clock in the evening of the day, when his train would leave Big Springs for Toyah.

That at 15 minutes after 8 o'clock on that evening the deceased left his residence for the purpose of going to and taking charge of his engine.

That his train was standing at its usual and customary place on a switch on the north side of the defendant's yards at Big Springs, and in order to reach his engine he was compelled to pass over and across several switches and the main track.

That while so passing across and over the defendant's yards, as he and other employees had been in the habit of doing for the previous nine or ten years, along the usual and customary path, and between the hours of 20 minutes after 8 o'clock and 9 o'clock, he was run down and killed by a flat car, coupled in front of a locomotive used by the defendant for switching purposes, and while moving westward on the main track of defendant's road in said yards.

That the defendant failed to place any headlight, lantern, or lights of any kind, or any other signal of danger, or any person to watch for employees, on said flat car, to give warning of its character, or to sound a whistle, or to ring the bell of the locomotive as it approached the crossing where the deceased was struck down.

That the headlight on the locomotive was so arranged that the rays of light from it passed entirely over and beyond the flat car in front of such locomotive.

That the defendant failed to have any lanterns or lights of any kind in or about its yards, or along that crossing.

That the engine used by the company for switching purposes on the occasion referred to was an ordinary heavy road engine with a pilot on in front, and was wholly unsuitable and unfit for such purposes, and that, in order to make it use-

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ful, the defendant coupled an ordinary flat car in front of the engine. And—

That the deceased, not knowing of such use of an ordinary road engine, with a flat car coupled in front of it, for switching purposes, and while passing along said usual and customary crossing through the defendant's yards, unable to see the flat car on account of the darkness of the night, and being blinded by the headlight on the engine, and not hearing the whistle or bell of the locomotive, and not knowing anything of the use and danger of the locomotive and flat car as an appliance for switching purposes, was run over by the flat car, and immediately killed.

The action proceeded upon the general ground that the railway company failed in its duty to supply and furnish proper and suitable machinery for switching purposes, so guarded by lights and otherwise as to give warning to its employees, who, in the discharge of their duties, were compelled to cross the tracks of the defendant's yards.

At the close of the evidence the company made six requests for instructions, one of which was that, as the plaintiffs had failed to prove their case, and had shown no right to recover, the jury should find for the defendant. These requests were all denied, and the defendant excepted to the action of the court in respect of each request.

The court then charged the jury as follows:

“ In this case there is no dispute about the following facts: Louis D. Gentry, on the night of the 13th of March, 1890, was run over and killed by a flat car of the defendant, propelled by a switch engine in its yards at Big Springs, Tex. At the time of his death he was an engineer of defendant, 35 years old, and earning from \$150 to \$160 per month. That he left surviving him his wife, May Gentry, 26 years old, and two children, Thomas Gentry, now 3 years old, and Olive Lee, now 7 years old, and his mother, Mary A. Gentry, who is a widow, and to whose support he contributed \$15 to \$25 per month. That his mother was about 75 years old at the time of Louis D. Gentry's death.

“ Louis D. Gentry, deceased, assumed the risk naturally incident to crossing the railroad track of defendant at Big Springs to reach his car, or in crossing said track for any other purpose. You are further instructed that defendant, in switching the cars, where said Gentry was killed, was not

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required to furnish absolutely safe machinery to do switching at that place, but only to use reasonably safe machinery to do said switching; and if you find, from the evidence, that the road engine and flat car used on the occasion when said Gentry was killed were reasonably safe, and were fairly adapted for switching purposes at Big Springs, then you will find for defendant.

“ If, however, you find, from the evidence, that said road engine and flat car, used by the defendant in switching, when said Gentry was killed, were not adapted to switching purposes, and that, as appliances for that purpose, they were unsafe, by reason of the way the light from the headlight struck the flat car and track of the road, or from other defects disclosed by the evidence, and that said Gentry's death was directly occasioned by said defects, without any fault or negligence on his part, then you will find for plaintiffs.

“ In considering whether the road engine and flat car used on defendant's road at the time said Gentry was killed were safe or unsafe appliances to be used in switching, your attention is asked to all the evidence pro and con on that subject, such as the opinion of the witnesses, the custom of this particular railroad, the effect of attaching flat cars, the effect of the engine light in lighting up the flat car and track, and the effect of the pilot.

“ A corporation is liable in damages to its employee who is injured by the use of defective machinery or machinery not adapted to the purposes for which it is used. The master, however, is not responsible if the employee had full knowledge of such defect or want of adaptability of the machinery used to the purpose for which it was used, nor is he liable if deceased contributed by his own neglect to his death.

“ Louis D. Gentry was a fellow servant of the employees of defendant operating the switching train that killed him. The defendant is therefore not responsible for any negligence that caused his death, but, if responsible at all, it must be under the third and fifth charges above.”

At the request of the plaintiffs the court gave this special instruction: “ The law does not exact of an employee the use of diligence in ascertaining defects in the appliances or instruments furnished by a railroad company, but charges him with knowledge of such only as are open to his observation. Beyond that, he has a right to presume, without inquiry or

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investigation, that his employer has discharged its duty of furnishing safe and proper instruments and appliances."

The court then instructed the jury, at the request of the defendant, as follows: "You are further instructed that railway companies are not required to furnish the best and latest appliances, but the appliances and machinery used by them in the carrying out of their business must be reasonably safe, and they are only required to exercise ordinary care to select and keep their appliances and machinery in safe condition. By 'ordinary care' is meant such care as a person of ordinary prudence would exercise under like circumstances. You are therefore instructed that, if you find and believe, from the evidence, that the engine and flat car used for switching purposes were reasonably safe, and that the Texas & Pacific Railway Company exercised ordinary care in the selection of the same, and the injury complained of was not the result of a failure on the part of the Texas & Pacific Railway Company to exercise such ordinary care, then you will find for the defendant."

1. The plaintiff Mary A. Gentry, the mother of the deceased, has moved to dismiss the writ of error as to her upon the ground that, her cause of action being separate and distinct from that of her co-plaintiffs, and a separate judgment in her favor for only \$1,000 having been entered in the circuit court, this court is without jurisdiction Amount in controversy. under the sixth section of the act of March 3, 1891 (chapter 517), which declares that, in all cases not by that section made final, "there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." 26 Stat. 826.

This motion is overruled. While there was, in form, a separate judgment in favor of each of the persons for whose benefit the action was brought, the statute of Texas creates a single liability on the part of the defendant, and contemplates but one action for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the persons whose death was caused in any of the specified modes. The final order in the circuit court was, in legal effect, a judgment for the whole amount of the damages found by the jury. Such an action as this can be brought by all the parties interested, or by any one of them for the benefit of all. If the parties

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entitled to bring suit fail to do so within the time prescribed, it becomes the duty of the personal representative of the deceased to commence and prosecute it. By whomsoever brought, the jury may give such damages as they think proportioned to "the injury" resulting from the death. It is one injury for which damages may be recovered, and "the amount" so recovered is to be "divided" among the persons entitled to the benefit of the action, or such of them as shall then be alive, "in such shares" as the jury shall find by their verdict. The jury found that the damages sustained by the deceased were \$10,166.66. That was the amount in dispute. The "matter in controversy" was the liability of the defendant company in that amount by reason of the single injury complained of. If the defendant was liable in that sum,—and such liability was fixed upon it by the verdict and final judgment thereon,—it was of no concern to it how that amount was divided among the parties entitled to sue on account of the single injury alleged to have been committed.

The case is determined by *Shields v. Thomas*, 17 How. 1, 4, 5. In a proceeding in one of the courts of Kentucky, a decree was rendered against the defendant for a large sum of money, "the shares of the respective complainants being apportioned to them in the decree," and the defendant being directed "to pay to each the specific sum to which he was entitled, as his proportion of the property misappropriated." A suit was brought in Iowa to enforce the decree of the Kentucky court, and the relief asked was a decree that Shields might be compelled to pay to the plaintiffs, respectively, "the several sums decreed in their favor." A decree of that kind was rendered. This court, speaking by Chief Justice TANEY, said: "The whole amount recovered against Shields, in the proceedings in Iowa, exceeds \$2,000. But the sum allotted to each representative who joined in the bill was less. And the motion is made to dismiss, upon the ground that the sum due to each complainant is severally and specifically decreed to him, and that the amount thus decreed is the sum in controversy between each representative and the appellant, and not the whole amount for which he has been held liable. And if this view of the matter in controversy be correct, the sum is undoubtedly below the jurisdiction of the court, and the appeal must be dismissed. But the court think the matter in controversy in the Kentucky court was the sum due to the

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representatives of the deceased collectively, and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the state. They all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point, and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him. * * * This being the controversy in Kentucky, the decree of that court, apportioning the sum recovered among the several representatives, does not alter its character when renewed in Iowa. So far as the appellant is concerned, the entire sum found due by the Kentucky court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And, if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part, and the amount exceeds \$2,000. We think the court, therefore, has jurisdiction on the appeal."

In *Ex parte* Baltimore & O. R. Co., 106 U. S. 5, 6, after referring to certain cases in which it had been held that when, in admiralty, distinct causes of action in favor of distinct parties, growing out of the same transaction, are united in one suit, according to the practice of the courts of that jurisdiction, distinct decrees in favor of or against distinct parties cannot be joined to give this court jurisdiction on appeal, it was said: "The cases of *Shields v. Thomas*, 17 How. 3, *Market Co. v. Hoffman*, 101 U. S. 112, and *The Connemara*, 103 U. S. 754, relied on in support of the present application, stand on an entirely different principle. There the controversies were about matters in which the several claimants were interested collectively under a common title. They each had an undivided interest in the claim, and it was perfectly immaterial to their adversaries how the recovery was shared among them. If a dispute arose about the division, it would be between the claimants themselves, and not with those against whom the claim was made. The distinction between the two classes of cases was clearly stated by Chief Justice TANEY in *Shields v. Thomas*, and that case was held to be within the latter class. It may not always be

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easy to determine the class to which a particular case belongs, but the rule recognizing the existence of the two classes has been long established."

The rule announced in *Shields v. Thomas* has been recognized in later cases. *Estes v. Gunter*, 121 U. S. 183, 185; *Gibson v. Shufeldt*, 122 U. S. 27, 33; *Clay v. Field*, 138 U. S. 464, 479; *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 51.

Another ground of the motion to dismiss is that a decree of affirmance, without specifying the sum for which it is rendered, is not a final decree of judgment from which an appeal or writ of error will lie. This position is not tenable. For the purpose of a writ of error to the circuit court of appeals, the judgment of the circuit court was final, because it terminated the litigation between the parties. The judgment of affirmance in the circuit court of appeals involved the same matter in dispute that was determined by the judgment of the circuit court, and was final for the purposes of a writ of error to this court. Upon the affirmance in the circuit court of appeals of the judgment of the circuit court, the latter court would have nothing to do except to execute its own judgment. And so, upon the affirmance by this court of the final judgment of the circuit court of appeals, the matters in controversy between the parties are concluded, and nothing will stand in the way of the execution of the judgment of the circuit court.

2. On the part of the defendant it is contended that the plaintiffs utterly failed to prove that Gentry was killed by a flat car coupled in front of a locomotive, as they alleged in their petition, or that his death was due to any negligence of the defendant, and consequently, that the court should have directed a verdict for the defendant; that the undisputed facts of the case not only did not establish any actionable negligence on the part of the defendant, but, on the contrary, negatived such negligence; and that the court erred in instructing the jury that there was no dispute as to the cause of Gentry's death, and in allowing testimony to be introduced on that assumption.

The court did not err, to the prejudice of the defendant, in saying to the jury that there was no dispute that Gentry was run over and killed by a flat car of the defendant propelled by a switch engine in its yards at Big Springs. Although no

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one saw the deceased, at the moment of his being run over, yet, under the evidence, all of which is before us, it was not possible for the jury to have doubted that the deceased was killed in the way stated by the court. If the jury had returned a verdict upon the theory that the evidence did not show that the deceased was killed by being run over by defendant's flat car coupled to one of its engines, it would have been the duty of the court, on motion, to set aside the verdict and grant a new trial. The fact of death in that mode was so clearly established that, if the case had turned alone upon that point, the court would have been authorized to direct a verdict for the plaintiffs. We think the court meant nothing more than that the fact of death being caused in the mode stated by it was placed by the evidence beyond dispute. If more was intended, or if the court erroneously assumed that the defendant admitted the fact to be as stated, no error was committed to the substantial prejudice of the defendant; for, as already said, the evidence authorized a peremptory instruction that Gentry was killed by being run over by a flat car attached to one of defendant's engines.

Equally untenable is the proposition that the evidence did not tend to show actionable negligence on the part of the defendant, and that the jury should have been so instructed. Whether the road engine and flat car used by the defendant on the occasion of Gentry's death were reasonably safe and fairly adapted for switching purposes, or were unsafe by reason of the way in which the light from the headlight on the engine struck the flat car and track of the road; whether, if the appliances used by the defendant for switching were found to be unsafe for such purposes, the deceased had full knowledge that they were not reasonably adapted to the uses to which they were put; whether the deceased, by his own negligence, contributed to his death,—these matters were all submitted to the jury. And they were submitted with the direction to consider all the evidence in the case, and under an injunction that the defendant was not responsible for any negligence on the part of the fellow servants of Gentry operating the switching train that killed him, and was only responsible in the event the jury found, from all the evidence on the subject,—“such as the opinion of the witnesses, the custom of this particular road, the effect of attaching flat cars, the effect of the engine light in lighting up the flat car and track, and the

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effect of the pilot,"—that the switching machinery or appliances furnished and used by the company were unsafe to be used. If, looking at all the evidence, and drawing such inferences therefrom as were just and reasonable, the court could have said, as matter of law, that the plaintiffs were not entitled to recover, an instruction to find for the defendant would have been proper. *Pleasant v. Fants*, 22 Wall. 116, 121; *Montclair v. Dana*, 107 U. S. 162; *Randall v. Railroad Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243. If the evidence had been so meager as not, in law, to justify a verdict for the party upon whom the burden of proof rested, the court would have been in the line of duty if it had so instructed the jury. *Sparf v. U. S.*, 156 U. S. 51, 109. No such course was proper in this case, which was one peculiarly for the jury, under appropriate instructions as to the principles of law by which they were to be guided in reaching a conclusion.

3. One of the assignments of error relates to the refusal of the court to give the following special instructions, asked by the defendant: "You are instructed that it is the duty of an employee, or any other party, about to cross a railroad track, to look and listen for passing engines, cars, or trains, to ascertain whether or not same are approaching, before going upon the track; and if the party fails to exercise such care, he cannot recover. You are therefore instructed that, if the deceased, L. D. Gentry, by looking or listening, could have known of the approach of the engine and car, and in time to have kept off the track and prevented the injury to himself, and that he failed to do so, you will find for defendant."

It is undoubtedly true, as claimed by the defendant, that the deceased was under a duty not to expose himself recklessly when about to cross the track of a railroad. In *Railroad Co. v. Houston*, 95 U. S. 697, 702, this court, after referring to certain acts of negligence upon the part of a railroad company which were alleged to have caused personal injuries, said: "Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger." To the same effect

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are *Schofield v. Railway Co.*, 114 U. S. 615, 618, 19 Am. & Eng. R. Cas. 353, and *Aerkfetz v. Humphreys*, 145 U. S. 418, 53 Am. & Eng. R. Cas. 459. But the present case did not admit of or require an instruction upon this special subject. There was no evidence upon which to rest such an instruction. As already stated, no one personally witnessed the crossing of the track by the deceased, nor the running of the flat car over him. Whether he did or did not stop, and look and listen for approaching trains, the jury could not tell from the evidence. The presumption is that he did; and, if the court had given the special instructions asked, it would have been necessary to accompany it with the statement that there was no evidence upon the point, and that the law presumed that the deceased did look and listen for coming trains before crossing the track.

In *Improvement Co. v. Stead*, 95 U. S. 161, 164, the court, speaking by Mr. Justice BRADLEY, upon the subject of the relative rights and duties of a railroad company and the owner of a vehicle crossing its track, said: "Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care." This principle was approved in *Railroad Co. v. Griffith*, 159 U. S. 603, 609. Manifestly, it was not the duty of the court, when there was no evidence as to the deceased having or not having looked and listened for approaching trains before crossing the railroad track, to do more, touching the question of contributory negligence, than it did, namely, instruct the jury, generally, that the railroad company was not liable if the deceased, by his own neglect, contributed to his death, and that they could not find for the plaintiffs unless the death of the deceased was directly caused by unsafe switching appliances used by the defendant, and without fault or negligence on his part.

The counsel for the defendant, in their elaborate brief, say: "Plaintiffs below cannot claim that the headlight of the engine did not illuminate and make plain to any one the flat car. They may contend that the headlight blinded the deceased. If this be true, he knew that switch engines with

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flat cars attached in front and behind them were continuously moving in and about the yard, and if the light did blind him he knew then and there the blinding effects thereof, and it was as careless for him to step upon the track just in front of a car as it would have been for a blind man to have so acted. We submit that, if he was blinded by the headlight, he was guilty of the grossest negligence, being blinded, in walking upon the track under the existing circumstances. We submit, however, that the evidence shows without contradiction that, by the exercise of ordinary care, he could have seen the flat car. We submit that a blind man who would attempt to cross the track just in front of the engine, the puffing and blowing of which he could hear, hoping to get across the track before the engine could strike him, would be guilty of the grossest negligence. In this case the deceased was not blind. He could see the engine with its headlight illuminating fifteen or twenty feet of the flat car next to the deceased, and lighting up the track for some distance ahead."

It is sufficient to observe that the evidence touching the matters referred to by counsel was not so clear and satisfactory as to justify the taking of the case from the jury upon the issue whether the deceased exercised due care under the circumstances which attended the occasion. It was properly left to the jury to determine whether, under all the circumstances, the effect of the headlight and flat car combined was to make the situation secure and safe to one who saw the headlight, but did not see the flat car in front of the locomotive. "What may be deemed ordinary care in one case," this court has said, "may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonably prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." Rail-

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way Co. v. Ives, 144 U. S. 408, 417, 55 Am. & Eng. R. Cas. 159.

We find no error of law to the prejudice of the plaintiff in error, and the judgment is affirmed.

PENNISON

v.

CHICAGO, M. & ST. P. R. CO.

(*Supreme Court of Wisconsin, May 22, 1896.*)

Liability of Purchasing Railroad for Tort committed Prior to Transfer by Purchased Railroad.—Where a complaint against a railroad company fails to show that the defendant company has consolidated with another railroad company, but merely alleges that the defendant has purchased the franchises and property of the other, it is insufficient in an action for a tort committed by such other company prior to the purchase by defendant.

APPEAL from circuit court, Brown county.

This is an action to recover damages against the defendant company for personal injuries sustained by the plaintiff, May 24, 1890, while in the employ of the Milwaukee & Northern Railroad Company as a brakeman on its road, and caused, as it is alleged, by the negligence of the latter company. The ground relied on to charge the defendant company for the tort or wrong of the Milwaukee & Northern Railroad Company is that the defendant company afterwards "purchased, and had assigned to itself, the railroad, franchises, immunities, stocks, bonds, and all property and appurtenances of the said Milwaukee & Northern Railroad Company, and has thereby become subject to all the liabilities of said company." The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and from an order overruling such demurrer the defendant appealed.

Greene, Vroman & Fairchild and *J. R. North*, for appellant.
Sheridan & Evans, for respondent.

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PINNEY, J. (after stating the facts).—The allegations of the complaint do not show a consolidation of the Milwaukee & Northern Railroad Company with the corporation defendant, under Rev. St. §§ 1833 or 1788, or otherwise, so as to impose on the latter the liabilities of the former company. Cases cited declaring and illustrating the effect of consolidation in respect to the debts and liabilities of the companies of which the consolidated company is composed are not material to the present inquiry. The complaint shows simply that what is called in some of the books a “succession” has taken place, and that the property and franchises of a corporation have been purchased at private sale, which differs from a consolidation in this respect: that the purchaser thus acquiring the property and franchises of the selling corporation does not become responsible for its liabilities already accrued. This is quite well settled, and we have not been referred to any well-considered case to the contrary. *Taylor Corp.*, § 415; *Wright v. Railway Co.*, 25 Wis. 46; *Vilas v. Railway Co.*, 17 Wis. 502; *Gilman v. Railroad Co.*, 37 Wis. 319; *Neff v. Boom Co.*, 50 Wis. 585; *City of Menasha v. Milwaukee & N. R. Co.*, 52 Wis. 414, 5 Am. & Eng. R. Cas. 300. In *Wright v. Railway Co.*, *supra*, the allegations relied on to charge the defendant company were, in substance, the same as in the present case, and extended there, as here, to a sale of the franchises; but it was held that this averment should be interpreted as extending only to the franchise of operating the road sold, and PAINE, J., states tersely that “the distinction between the franchise of constructing and operating a railroad, and the franchise of being a corporation, and of contracting, suing, and being sued as such, is well established,” and that upon such allegations it was only the former that passed to the purchaser. In the absence of a contract, or of a statute imposing the liability contended for, it does not exist. *Hoard v. Railway Co.*, 123 U. S. 222; *Railway Co. v. Miller*, 114 U. S. 176; *Cook v. Railroad Co.*, 43 Mich. 349, 9 Am. & Eng. R. Cas. 443; *Railway Co. v. Griffin*, 92 Ind. 487, 492; *Pennsylvania Transp. Co.’s Appeal*, 101 Pa. St. 576; *Hammond v. Railway Co.*, 15 S. Car. 10. The Milwaukee & Northern Railroad Company, so far as the allegations of the complaint show, is a still existing corporation, and has presumptively received a proper consideration for the sale of its property. This is not an action to assail

the validity of the transfer of the property, but is a legal action to recover against the defendant, the purchasing company, damages for the previously committed tort of its vendor. The Milwaukee and Northern Railroad Company could not, by any act of its own will, transfer its franchise to be a corporation. Such a franchise is not the subject of sale and transfer, unless by virtue of some positive statutory provision. It is entirely distinct from the franchises of the corporation to construct, operate and manage its road. 1 Beach, Corp. §§ 361, 362; *Memphis & L. R. Co. v. Com'rs*, 112 U. S. 609, 619; *Com. v. Smith*, 10 Allen 448, 455; *Snell v. City of Chicago*, 152 U. S. 197. The remedy of the plaintiff, if any, is against the Milwaukee & Northern Railroad Company. Upon the allegations of the complaint, he has none against the defendant company. The order appealed from is reversed, and the cause is remanded for further proceedings according to law.

NOTES.

Purchase of Railroad—Liability in Tort or Contract.—The city of Watertown issued its bonds in aid of the Milwaukee & Watertown R. R. Co., which guaranteed their payment. Afterward that company became consolidated, in pursuance of law, with the Milwaukee & La Crosse R. R. Co., which subsequently sold the Watertown division of its road (including what had previously been owned by the Milwaukee & Watertown Co.) to a third corporation, which sold it to the defendant. *Held*, that while the guaranty of said bonds became part of the general indebtedness of the Milwaukee & La Crosse Co., after the consolidation, defendant, as purchaser of the Watertown division of its road, is not liable for any part of such indebtedness. *Wright v. Milwaukee, etc., R. Co.*, 25 Wis. 46.

A special receiver or assignee of the property of a railroad corporation, appointed in bankruptcy proceedings, involuntary on its part, is not an agent or servant of the corporation, and it is not liable for damages occasioned by his negligence. *Cited*, *Kain v. Smith*, 80 N. Y. 460.

It seems that, upon a sale by an assignee in bankruptcy of the tracks, fixtures, rolling stock and franchises of a railroad corporation, the corporation, as a legal entity, does not vest in the purchasers, and they do not become stockholders or corporators therein. Nor are the purchasers liable for damages resulting from negligence of those operating the road, intermediate the time of sale and the confirmation thereof by the court. *The Com. v. Central Pass. R. Co.*, 52 Pa. St. 506, *distinguished*. *Metz v. Buffalo, etc., R. Co.*, 58 N. Y. 61. See also *Secombe v. Milwaukee, etc., R. Co.*, 2 Dill. (U. S.) 469; *Hopkins v. St. Paul, etc., R. Co.*, 2 Dill. (U. S.) 396.

Subjected to Liabilities by Decree for Sale.—Where a company takes and retains possession of a railroad and other property of a former company under a deed made under a decree of court for a sale of the property, the deed containing a clause "that said estate and interest are hereby charged with and shall pass by virtue of these presents, subject to the payment of all liabilities incurred in respect to the said railroad, or its business, by the said receiver," during the pendency of the legal proceedings in which the receiver was appointed, the grantee company will hold the property conveyed to it, subject to the payment of such liabilities as the receiver had incurred while he had the possession and control of the road. *Brown v. Wabash R. Co.*, 96 Ill. 297.

Where a railway receiver was discharged, and the sale of the property confirmed to a newly-organized corporation, with the provision in the order of confirmation that the new company should pay all the debts of the receiver and all claims or liabilities pending in the foreclosure case,—*held*, that the new company could not be permitted, after accepting the property, to question the validity of the order. *Farmers' Loan & Trust Co. v. Central R. Co.*, 17 Fed. Rep. 758, 12 Am. & Eng. R. Cas. 461.

A decree of foreclosure and sale, made by a circuit court, on a railroad mortgage, provided that the purchaser should pay off all claims incurred by the receiver, and that all such claims should be barred unless presented within six months after the confirmation of the sale. On the sale the property was bought by the appellants. The decree confirming the sale provided that a deed should be given, and the purchasers should take the property, and the deed should recite that they took it, subject to all claims incurred by the receiver. After the six months had expired, the appellee filed a petition to recover damages for an injury sustained by him, as a passenger on the road through the negligence of the employees of the receiver. The expiration of the six months was set up as a bar to the claim. It did not appear that the purchasers objected to the terms of the decree of confirmation, or appealed to this court from that decree. *Held*, that the circuit court had discretion to abrogate the six months' limitation, and to decree that the purchasers should pay the claim, as the receiver had been discharged. *Olcott v. Headrick*, 141 U. S. 543.

A. recovered a judgment against the Terre Haute, Alton & St. Louis Railroad Company, for work and labor performed for it, and subsequently the road was sold, and its purchasers were, by an act of the legislature, passed February, 1861, incorporated as the St. Louis, Alton & Terre Haute Railroad Company, under which they organized, and which act provided, among other things, that, as a condition precedent to its operation, they should pay all unsatisfied judgments which had been recovered against the former company for work and labor done for it. In an action of debt, brought against the St. Louis, Alton & Terre Haute Railroad Company upon this judgment,—*held*, that the company was liable, it having

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succeeded, under said act, to all the corporate powers, privileges and franchises of the Terre Haute, Alton & St. Louis Railroad Company, and having assumed, in consideration of such grant, to pay and discharge all judgments of such a character, remaining unsatisfied against said company last named. St. Louis, etc., R. Co. v. Miller, 43 Ill. 199.

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v.

HARDY.

(*Supreme Court of New Jersey, June 4, 1896.*)

Transfer of Services.—A general servant of one person may, for a particular work or occasion, become *pro hac vice* the servant of another person, so that the latter will not be liable to him for an injury occasioned by the negligence of other servants engaged with him in a common employment.

Express or Implied Consent of Servant Necessary for Transfer of Services.—To establish the relation of master to such a servant, it must appear that the servant has, expressly or by implication, consented to the transfer of his services to the new master, and to accept him as his master *pro hac vice*, and has entered upon such service, and submitted himself thereon to the direction and control of the new master.

ERROR to Essex county circuit court. *Affirmed.*

Argued February term, 1896, before the CHIEF JUSTICE, and DIXON, GARRISON, and MAGIE, JJ.

Flavel McGee, for plaintiff in error.

Thomas N. McCarter, Jr., for defendant in error.

MAGIE, J.—The bills of exceptions show the following undisputed facts: The Passaic Rolling-Mill Company contracted with the Delaware, Lackawanna & Western Railroad Company, the plaintiff in error, to furnish, at a specified price, the materials for rebuilding certain railroad bridges of the latter company, and also skilled workmen to erect such bridges. The workmen furnished were such as had previously been in the employ of the rolling-mill company. They continued to be paid by that company, but after payment the amount paid, with some percentage added, was repaid by the

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railroad company. The work was to be done under the direction of engineers of the railroad company, but foremen of gangs were among the workmen furnished. Hardy, the defendant in error, was a workman furnished under the contract. While a bridge in the vicinity of the station at Newark was being rebuilt, employees of the railroad company drew a train upon it from the west, detached the locomotive, which passed on to the east, and left the train standing without any locomotive attached. Hardy was at that time directed by a foreman to drive in some wedges to wedge up the false work. In doing this he stood beside and below the train, with his left hand grasping one of the rails of the track, and his right using a mallet. While in this position a locomotive engineer of the railroad company backed a locomotive down from the west. Other employees attached it to the standing train, which was then drawn by it towards the west. The wheels of the train passed over Hardy's left hand, injuring him permanently. It is now contended that there was error in the refusal to nonsuit, and in the refusal to direct a verdict for the railroad company. This contention is first put upon the claim that the evidence showed beyond dispute that Hardy and the engineer who drove the train which injured him were engaged at the time in a common employment, and servants of the railroad company, so that the company was not liable for the engineer's negligence. When this action was first tried the trial court nonsuited the plaintiff, holding that upon the evidence then before it the relation of common service between him and the engineer of the railroad company was established. The ruling was made on the authority of *Ewan v. Lippincott*, 47 N. J. L. 192. Upon error this court reversed the judgment, and held that upon the evidence it should have been left to the jury to determine whether Hardy was in the employ of the railroad company. *Hardy v. Railroad Co.*, 57 N. J. L. 505. The judgment of the supreme court was afterwards affirmed in the court of errors, but the case is not reported. Afterwards the record was remitted, a *venire de novo* issued, and the action again tried. It is the record of that trial which is now before us. If the evidence in these bills of exceptions is identical with that which was before the court upon the former review, it is obvious that the same result must be reached. But it is claimed on the part of the railroad company that the case made on this trial so differs

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from that made on the former trial that the submission of the question of common service to the jury was not required by what was adjudged in the former case in this court, or the court of errors. This renders necessary a consideration of the whole case.

The "doctrine of collaborateur," as it is sometimes called, is this: A master who would be liable for an injury inflicted by the negligence of one of his servants upon a stranger will not be liable for a like injury inflicted upon another of his servants engaged at the time in a common employment with the negligent servant. To establish the immunity of the master, two things must appear: (1) That the person injured and the person doing the injury were his servants; and (2) that they were both at the time engaged in labor for him, tending to a common purpose, which is to be in a common employment. In a majority of cases the first of these requisites is made out by proof that both the person injured and the person doing the injury were engaged and employed as servants, were paid for their services, and were directed and controlled therein by one and the same person. Usually the contest is over the other requisite of common employment. But in the class of cases of which that before us is a sample the contest is over the establishment of the relation of service. Doubtless, no man can serve two masters, yet the law clearly recognizes a sort of duality of service. A general servant of one person may, for a particular work or a particular occasion, become *pro hac vice* the servant of another person. What will suffice to prove the assumption of the dual service gives rise to question. I think the applicable rule is admirably expressed by Lord WATSON thus: "I can well conceive that the general servant of A might, by working towards a common end, along with the servants of B, and submitting himself to the control and orders of B, become *pro hac vice* B's servant, in such sense as not only to disable him from recovering from B for injuries sustained through the fault of B's proper servants, but to exclude the liability of A for injury occasioned by his fault to B's own workmen. In order to produce that result the circumstances must be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purposes of the common employment." *Johnson v.*

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Lindsay, [1891] App. Cas. 371. To establish the fact that the servant of one has thus transferred his services to another *pro hac vice*, it must appear that he has assented expressly or impliedly to such transfer. No one could transfer the services of his servant to another master without the servant's consent. It must further appear that the servant has in fact entered upon the service, and submitted himself to the direction and control of the new master. His assent may be established by direct proof that he agreed to accept the new master and to submit himself to his control, or by indirect proof of circumstances justifying the inference of such assent. Such evidence may be strong enough to justify a court in removing the question from the jury, or it may require to be submitted to the jury. The case of Ewan v. Lippincott, *ubi supra*, has, as I conceive, been misunderstood. It falls within the rule above stated. It came to this court upon a rule to show cause. It appeared in the case that Ewan was a machinist employed by D. & W., master machinists. Lippincott was a mill owner who employed D. & W. to alter the gearing of a wheel. D. & W. sent Ewan to do the work, and he and Lippincott arranged how it was to be done, and particularly that, at times when Ewan was not at work on the wheel, it should be run by Lippincott's engineer to furnish power for the mill. The trial judge charged that, upon this evidence, Ewan and the engineer (whose negligence had injured Ewan), were not servants of a common master. Obviously, this ruling was erroneous, if the evidence either established, or tended to establish, that they were fellow servants. In the former case a nonsuit should have been granted. In the latter case the question should have been submitted to the jury. The verdict was set aside, and a new trial granted. The opinion of Mr. Justice REED clearly indicates that in his view the evidence established the co-service of Ewan and the engineer, and in that opinion I concur. But it is unnecessary to go so far in order to support that case, for there was clear evidence from which a jury might infer that Ewan had assented to the transfer of his services to Lippincott, and submitted thereon to his control. The much-discussed case of Wiggett v. Fox, 11 Exch. 832, was cited and relied on by Mr. Justice REED, and, in my judgment, exhibits the application of the same rule. The jury had found that the injured person was in the employment of a subcontractor, and not of

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the defendant, who was the general contractor for the building of the Crystal Palace. The reviewing court, having found that the evidence established that the subcontractor and his men (including the plaintiff) had submitted themselves to the control of the general contractor, and accepted him as their master, set the verdict aside and directed a nonsuit. The case was thus explained by Baron CHARMELL, though Lord COCKBURN doubted whether the facts were correctly stated. *Abraham v. Reynolds*, 5 Hurl. & N. 143; *Rourke v. White Moss Colliery Co.*, 2 C. P. Div. 205. Later English cases show the application of the same rule. *Johnson v. Lindsay*, 23 Q. B. Div. 508; *Id.*, [1891] App. Cas. 371; *Cameron v. Nystrom*, [1893] App. Cas. 308. After examining the evidence I have reached the conclusion that there was no error, or at least none injurious to the railroad company, in submitting to the jury the question whether Hardy, at the time of his injury, was in its employ. He had been employed by the rolling-mill company, and continued to be paid by their paymaster, and to be directed in his work by their foremen. The agreement between that company and the railroad company that the engineers of the latter should control the work was not made known to him, nor was there a particle of proof that such engineers exercised such control in Hardy's presence, or within his knowledge, as to justify an inference that such control existed. Indeed, it is open to serious question, in my judgment, whether the trial court might not have justly directed the jury that there was no sufficient evidence of Hardy's assent to the transfer of his services, or acceptance of the railroad company as his master.

The contention that there was error in refusing to nonsuit or to direct a verdict is next put upon the ground that there was no evidence of negligent management of the train which injured Hardy. But this contention cannot prevail. The railroad company had arranged to rebuild its bridges while using them for the passage of its trains, and in this case for drilling a train. This use rendered the situation of all workmen employed on the bridge exceedingly perilous. That there was cast upon the company a duty to take such reasonable care for the safety of those workmen as the extraordinary circumstances made requisite, and that for the want of such care by its servants it would be liable, are propositions not open to discussion. There was evidence from which may be

inferred the want of reasonable notice, to workmen who might be exposed to peril thereby, of the movement of this train.

The contention is next put upon the ground that the evidence conclusively established negligence on the part of Hardy contributing to his injury. Reliance is placed upon the fact that he unnecessarily grasped the rail under a car, in such a position that the movement of the car would crush it. There was proof that, by the use of planks which were provided, Hardy's work could have been done without the least risk. If that evidence stood uncontradicted, a different question would be presented. But Hardy testified that he could not have driven the wedges by the use of the planks, nor without supporting himself by his left hand, and that the only thing that his hand could grasp, to support him, was the rail. Hardy was engaged in a dangerous employment. His duty undoubtedly was to take reasonable care not to expose himself to unnecessary risks. Whether or not he could have done his work, by the use of the planks, without risk, and whether or not he exercised the required care for his safety, in placing his hand on the rail under a train which had no motive power attached, and retaining it there, in the absence of notice that the locomotive had been attached to it and was about to move it (for that was the case made by his evidence), were clearly questions for the jury, and it was no error to submit them for their determination. Whether their verdict was against the weight of evidence cannot be considered.

Other assignments relate to alleged errors in the admission or rejection of evidence. None of them were much urged in argument, and upon examination no error is discovered in any of the rulings objected to. Let the judgment be affirmed.

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ST. LOUIS, K. & S. R. Co. *et al.*

v.

WEAR, JUDGE.

(Supreme Court of Missouri, June 15, 1896.)

Writ of Prohibition.—If the facts shown by a record reveal a failure of jurisdiction or an unwarranted exercise of judicial power, causing an immediate and wrongful invasion of rights of property, a writ of prohibition will lie to check the execution of an order of a lower court or to set aside proceedings, either at law or in equity, which have already been had.

Power of Judge to appoint Receiver Outside of County in which Cause is Pending.—A state statute conferring upon judges of trial courts the power to appoint receivers in vacation, authorizes them to exercise that power out of, as well as in, the county where the cause is pending, if within the circuit.

Appointment of Receiver in Ex Parte Proceedings.—Where a state statute provides that an appeal may be taken from any order refusing to revoke, modify or change an interlocutory order appointing a receiver, and provides for a summary determination of such appeals, the court cannot appoint a receiver without notice in an *ex parte* proceeding for a period longer than is reasonably necessary to allow the defendant to show cause against the continuance of the receivership, and the procedure in such cases must be formed so as to permit a speedy review of interlocutory orders appointing receivers in vacation as well as in term.

Case at Bar.—A receiver was appointed for a going corporation by an order made in vacation on an *ex parte* application, without notice, and the said order fixed the date three months distant, at which the corporation might show cause why the receivership should not be continued. *Held*, that the final hearing having been deferred an unreasonable length of time, the order was in excess of the limitations on the power of appointing without notice.

Same.—A petition seeking the appointment of a receiver for a corporation gave notice that the property of the company was in possession of an alleged new company, but failed to make the alleged company a party to the proceedings. *Held*, upon appointment of the receiver and refusal of the new company's officers to surrender the property, that it was not in the jurisdiction of the court to issue a writ, directing the sheriff to place the receiver in possession and to arrest the officers for contempt.

Writ of Prohibition—Defect of Jurisdiction.—The fact that no objection was made on the ground of want of jurisdiction at the time of granting the order appointing the receiver is no barrier to a writ of prohibition where the order complained of was entered in vacation, *ex parte*, and the defect of jurisdiction appears on the face of the papers.

Liability for Contempt of Court.—Where an order of court has been

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issued without jurisdiction, a refusal to obey it does not render the person refusing liable for contempt.

Manager of Railroad cannot be Appointed Receiver of Second Railroad.—A state statute declaring it unlawful for any officer of a railroad company or corporation, or any individual owning, operating or managing any railroad, to act as an officer of any other railroad company or corporation operating or having control of a parallel or competing line, prevents the president of a railroad company from acting as receiver of a company operating a parallel or competing line.

THE proceeding before Judge WEAR was upon a petition in which Mr. Kerfoot was named as plaintiff, and the “St. Louis, Kennett & Southern Railroad Company, a corporation, and Louis Houck, E. F. Blomeyer, L. B. Houck, Theophilus Besel, and E. S. McCarty, as directors in said railroad company, and the Pemiscot Railroad Company, a corporation, and Robert G. Ranney, Leo Doyle, Robert T. Giboney, and John R. Jeannin, directors in said railroad company, and Louis Houck,” defendants. The substance of that petition (according to the statement of the counsel for defendants in the supreme court, which statement is regarded as sufficiently full for the purposes of the prohibition case) is as follows:

“On the 17th of March, 1890, there was organized under the laws of this state the St. Louis, Kennett & Southern Railroad Company, with a capital of \$180,000, divided into 1,800 shares of the par value of \$100 each, designed to be constructed and operated from Campbell to Kennett, Dunklin county, Missouri,—a distance of 19 miles. Of this stock, A. J. Kerfoot held, and still holds, 108 shares, and E. S. McCarty, Harry H. Ferguson, Melvin L. Gray, and George Denison, respectively, held 108 shares. Prior to the —— day of July, 1891, all the shares of the other stockholders in said company were purchased by said A. J. Kerfoot and E. S. McCarty. On July 8, 1891, said Kerfoot and McCarty entered into a contract with relator Louis Houck, by the terms of which said Houck agreed to transfer to said Kerfoot and McCarty ten interest-bearing extension bonds of the Cape Girardeau Southwestern Railway Company, each for \$1,000, which were represented to be worth $\frac{81}{100}$ of their face value, and also to organize a construction company for the purpose of making a connection between the said railroads at the town of Campbell, said connection being of the approximated length of 30 miles. Of the stock of said construction company, said Kerfoot and McCarty were to receive 49 per cent.,

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and on the construction of said connection, said Kerfoot and McCarty were to be superintendent and general manager, respectively, at salaries of not less than \$175 per month. By the terms of this contract, one-half of the real estate belonging to said St. Louis, Kennett & Southern Railway Company at Kennett was to be transferred to said Kerfoot and McCarty. In consideration of the foregoing, said Kerfoot and McCarty were to transfer to said Houck 300 shares of their stock in said railroad company, on the completion of the contract aforesaid. After the above terms of said contract had been agreed on and set forth therein, additional stipulations were inserted by said Houck in said contract, without the knowledge and consent of said Kerfoot and McCarty, to the effect that in no event was said Houck to be personally responsible for the fulfilment of said contract, and that, if said contract should not be kept on his part, such failure should not affect in any wise the said contract, and that 1,360 additional full-paid shares of stock in said company should be issued to said Houck, and that the 240 shares of said Kerfoot and McCarty should be considered full paid. While the bonds above referred to were by said Houck transferred to said Kerfoot and McCarty, not only were they not of the value represented by said Houck, but of no value whatsoever; and while said construction company was organized, and certain certificates of its stock transferred to said Kerfoot and McCarty, the purpose of its organization—the construction of a connection between the aforesaid railroads—was not only never accomplished, but never attempted to be carried out, and said certificates are consequently of absolutely no value. Shortly after the transfer of the 300 shares of the stock of the St. Louis, Kennett & Southern Railroad Company by said Kerfoot and McCarty to said Houck on the faith of the performance of the terms of said contract by said Houck, said Houck held a meeting of the pretended shareholders holding shares in excess of those held by said Kerfoot and McCarty,—to whom no notice of said pretended meeting was ever given, or attempted to be given, and of which they had no knowledge or information,—whereat said pretended shareholders did attempt and pretend to issue to said Houck 1,360 additional shares of stock of said railroad company. This action of said pretended shareholders, respondent, Kerfoot, claims to be fraudulent, illegal, and void, against which he has protested,

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and now protests, and in affirmance of which he has done and will do nothing. By reason of the aforesaid facts, it is claimed that the consideration for the transfer of said stock to Houck has failed, and was only brought about by the false and fraudulent representations of said Houck, with the intent to cheat and defraud said Kerfoot and McCarty.

“ It is also charged in said petition: That, having thus fraudulently obtained control of said railroad, said Houck and the other relators have mismanaged, and been guilty of gross negligence and misconduct in their trust capacity as directors, officers, etc., and fraudulently combined to cheat and defraud respondent, Kerfoot, and to render his shares of stock valueless, etc., together with those of other of the stockholders. That the other relators, as directors of said company, are under the influence and control of said relator Houck, and conform their actions to accomplish his fraudulent and illegal purposes, and to carry out his unlawful designs. That said Louis Houck is the principal shareholder in a company organized to construct a railroad through the counties of St. Genevieve and Perry, in the state of Missouri, which said road is located many miles from the St. Louis, Kennett & Southern, and that, being entirely without credit, said Houck has used in the construction of said road divers funds belonging to said St. Louis, Kennett & Southern Railroad Company, without any authority so to do from the stockholders and directors of said company, although with the pretended authority of said board of directors. That said Houck is also the principal stockholder in a certain railroad in process of construction through Scott county, Missouri, and in the construction of this road said Houck has illegally and fraudulently, in like manner and to like ends, appropriated the funds of said St. Louis, Kennett & Southern Railroad Company. That on or about Februaray 15, 1892, the Pemiscot Railroad Company was organized,—and constructed during the year 1894,—of which said Houck was the real and substantial owner. That in the construction of this road said Houck wrongfully and fraudulently appropriated certain of the funds of said St. Louis, Kennett & Southern Railroad Company, in the manner and with the purposes as aforesaid. That on the 22d day of April, 1895, said Houck, in furtherance of his said designs to destroy the value of said Kerfoot's stock, and of the property of said St. Louis, Kennett & Southern Railroad Company,

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caused the said pretended stockholders of said company to adopt a contract attempted to be entered into between the directors of said last-named companies, whereby the two said railroads should be consolidated into one road. Of none of these proceedings was said Kerfoot notified, and of none of which did he have any knowledge or information, nor did he in any manner participate therein. Under this pretended contract of consolidation, the stock of the two companies was to be called in, and new stock in the consolidated company issued in lieu thereof. That said contract was submitted to a pretended meeting of said shareholders of the St. Louis, Kennett & Southern Railroad Company, and the minutes of said meeting purport to show that said contract was adopted by a majority of its stockholders, all of which is false. That a copy of said minutes, and also the minutes of a similar meeting of the shareholders of said Pemiscot Railroad Company, showing a like pretended ratification of the same contract, have been filed in the office of the secretary of state of the state of Missouri. The said attempted consolidation was fraudulent and void, in that it was not effected in conformity with the laws of the state of Missouri, and with a fraudulent intent and purpose, and because no notice of said meeting was given said Kerfoot, who was not present thereat, although in the copy of the minutes of said meeting on file with the secretary of state he is falsely represented as voting in favor of said consolidation. That the terms of said contract of consolidation were not carried out by said Houck, or the other relators. That the earnings of said company are not sufficient to discharge its accruing obligations, and that the salaries and wages of its employees have not been paid for the last six months, and that it is now in debt to its said employees to the extent of many thousand dollars. That by reason of the acts aforesaid said company is unable to secure supplies needed in the operation of the road. That the rolling stock and other properties are in need of repair and replenishing, which the relators have failed and refused to have done. That no provision has been or is now being made for the extinguishment of the outstanding debts and bonds hereafter to accrue. That said Houck on the 2d day of December, 1895, did remove respondent, Kerfoot, from his position as superintendent of said road, and did appropriate his salary to himself, through one of the relators, his kinsman Louis B. Houck. That the

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said Pemiscot Railroad Company is, and was at the time of the attempted consolidation aforesaid, hopelessly insolvent. That its debts have not been paid, except such as were paid out of the earnings of the St. Louis, Kennett & Southern Railroad Company as aforesaid, and that said attempted consolidation was but a part of the plan of said Houck to secure and absorb both properties. That by reason of all of which the said St. Louis, Kennett & Southern Railroad Company has become greatly embarrassed financially, and that a continuation of such acts of mismanagement will bring about the insolvency and bankruptcy of said corporation.

“ The prayer of the bill is that relators, as officers of said company, be restrained from diverting further amounts of money from the treasury of said company; that they be suspended from office as directors, etc., and that a new election be ordered to be held to supply the vacancy thus to be created; that an accounting be had with respect of the funds diverted as aforesaid; that a decree be rendered annulling said pretended consolidation, and restoring the funds so diverted from the treasury of the St. Louis, Kennett & Southern Railroad Company; that said 300 shares of stock, or their proportionate interest therein, transferred by said Kerfoot and McCarty, be restored to them, and that said contract under which the transfer was made be annulled, for reasons aforesaid; that said issuance of the 1,360 shares of stock be annulled and canceled, for the reasons before mentioned; and that said Houck be required to account for the benefits that have accrued to him by reason of the transfer of said 300 shares of stock, and the issuance of said 1,360 shares; and that he be ordered to pay one-half of the same to said Kerfoot. An offer is made to return to said Houck one-half of the shares of stock in the construction company before mentioned, and like offer with respect of said extension bonds. The petition then asks for the appointment of a receiver pending the determination of the issues tendered, in order to prevent the misappropriation, and to insure the preservation of the properties involved.”

The order of Judge WEAR, appointing the receiver, is as follows:

“ State of Missouri, county of Dunklin—ss.: In the circuit court, July term, 1896. A. J. Kerfoot, Plaintiff, v. The St. Louis, Kennett & Southern Railroad Company, a corporation,

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and Louis Houck, E. F. Blomeyer, L. B. Houck, Theophilus Besel, and E. S. McCarty, as directors in said Railroad Company, and the Pemiscot Railroad Company, a corporation, and Robert G. Ranney, Leo Doyle, Robt. T. Giboney, Louis Houck, and John R. Jeannin, directors in said Railroad Company, and Louis Houck, defendants. In Vacation. Order of Appointment of Receiver. Now, on this 11th day of April, 1896, comes A. J. Kerfoot, and presents to me, JOHN G. WEAR, judge of the circuit court of Dunklin county, Missouri, in vacation, at chambers, in the city of Poplar Bluff, in the county of Butler, in the state of Missouri, a certified copy of his petition filed in the office of the clerk of the said circuit court of said Dunklin county, in a certain cause entitled above; and with it he presents his motion, verified by his affidavit, by which he asks the appointment of a receiver of the real and personal property of the said defendant corporations named above, which said motion is hereto attached. And the said JOHN G. WEAR, judge as aforesaid, having heard said motion, and having duly considered the same, together with the facts offered in connection therewith, does hereby order that Samuel W. Fordyce, of the city of St. Louis, Missouri, be, and he is hereby, appointed as receiver of all and singular the real and personal property, wherever situate, of the said St. Louis, Kennett & Southern Railroad Company, and of the said Pemiscot Railroad Company, and that he shall immediately qualify as such, by giving bond for the faithful performance of his duties as such receiver, in the sum of twenty-five thousand dollars, and that after his qualification as such receiver, having duly taken the oath prescribed, he shall proceed to the county of Dunklin, and to the county of Pemiscot, in the state of Missouri, and shall take charge of the said property of the said railroad companies, including the rolling stock, the depots, books, and papers, of the said companies, and that he shall then take an inventory of all of the said property so taken charge of by him; that he shall manage the said railroad properties carefully and discreetly; that he shall continue to fulfill and perform all of the existing contracts of the said railroad companies until the further order of the court in the premises; that he shall discharge all of the current expenses of the management as such receiver out of the earnings of the said roads while they are in his hands or custody; that he shall keep an accurate and exact account of

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the expenses and of the income of the two said railroads, the one extending from Campbell, Missouri, to Kennett, Missouri, and the other extending from Kennett, Missouri, to Caruthersville, Missouri, preserving the said expenses and income separate in all of the transactions of himself as such receiver, and that he shall keep and maintain the said properties in good condition until the further order of the said circuit court of Dunklin county, or the judge thereof in vacation; and that he make a full report of his acts as such receiver to the next term of said court, unless ordered to do so before that date. It is further ordered that each and every agent and employee of the said defendant railroad companies named above, whether regarded as the employees of the said companies as one corporation, or as two separate corporations, shall, upon the demand of said Samuel W. Fordyce, after his qualification as such receiver, immediately yield to said receiver the possession and control of all the property, books, and accounts of the said defendant railroad companies or company, and the said Louis Houck and the other defendants named as the officers and directors of said defendant companies are hereby ordered to turn over and deliver to the said receiver all of the books and papers of the said company or companies which pertain in any wise to the management and business of the said company or companies. It is further ordered that in the event that any such employee of said company or companies shall fail or refuse to so deliver to said receiver the property in his said care and custody, or should said defendants fail or refuse to so deliver to said receiver the books, papers, or other property of the said defendant company or companies, the said receiver shall at once report the person so failing or refusing to the undersigned judge for his further orders in that behalf. The said defendants and their employees are hereby enjoined and forbidden from in any manner interfering with the said possession of the said receiver after he shall have obtained the possession of the said property hereby ordered into his hands, until the further orders of the said court, or of the judge thereof in vacation. It is further ordered that this order be filed in the office of the clerk of said court of said Dunklin county, and that a certified copy thereof be furnished the said Samuel W. Fordyce, as such receiver, and that a duly-certified copy thereof be served upon the defendants named above. It is further ordered that the said

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defendants be notified to appear before me, the undersigned judge of the circuit court, at the next term of the circuit court, in the county of Dunklin, in the state of Missouri, then and there to show cause, if any they can, why the appointment hereby made should not be continued, and the property kept by the said receiver, pending a hearing upon the merits of this controversy, and until the said defendants may be heard upon the merits thereof. And the service of a duly-certified copy hereof shall be deemed sufficient service of the said notice. Done at chambers in the city of Poplar Bluff, in the county of Butler and state of Missouri, this 11th day of April, 1896. JOHN G. WEAR, Judge."

The writ issued by Judge WEAR for the seizure and delivery of the property of the railroad company is as follows:

"State of Missouri, County of Dunklin—ss.: In the Circuit Court, to July Term, 1896. A. J. Kerfoot, Plaintiff v. The St. Louis, Kennett & Southern Railroad Company, a Corporation, and Louis Houck, E. F. Blomeyer, L. B. Houck, Theophilus Besel, and E. S. McCarty, as Directors in said Railroad Company, and the Pemiscot Railroad Company, a Corporation, and Robert G. Ranney, Leo Doyle, Robt. T. Giboney, Louis Houck, and John R. Jeannin, Directors in said Railroad Company, and Louis Houck, Defendants. To W. G. Petty, Sheriff of Dunklin County, Missouri: Whereas, it appears to me, JOHN G. WEAR, judge of the circuit court of said Dunklin County, Missouri, sitting in chambers, in vacation, by the report of S. W. Fordyce, whom I did on the 11th day of April, 1896, appoint as receiver of all of the property of the said St. Louis, Kennett & Southern Railroad Company, and of the said Pemiscot Railroad Company, which report is duly verified, that the said Samuel W. Fordyce did on said 13th day of April, 1896, proceed to the town of Kennett, in said Dunklin county, Missouri, and did then and there cause to be served upon one Louis B. Houck, whom he found in the charge and management of the said property of the said railroad companies or company named above, a duly-certified copy of my order made in the above-entitled cause, appointing him, the said S. W. Fordyce, as such receiver, and that he did then and there demand of the said Louis B. Houck the possession and custody of the property of the said railroad companies or company, and did demand that the said Louis

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B. Houck relinquish the possession and control thereof to him, the said receiver, and that said Louis B. Houck did then and there fail and refuse so to turn over and deliver to said receiver the possession and control of the said railroad or railroads, and of the said property of the said railroad company or companies, and did then and there fail and refuse to relinquish the said possession and control thereof; and that the said Louis B. Houck did wilfully violate the commands of my said order of appointment of the said Samuel W. Fordyce as such receiver: This is, therefore, to command you that you do forthwith summon the power of the said county of Dunklin, if necessary, and that you proceed to the property of the said railroad company or companies named above, and to its railroad office or offices, wherever situate or found in your county, and that you put and place the said Samuel W. Fordyce, as such receiver, in charge, custody, and possession thereof, and that you dispossess therefrom, and from every portion or part thereof, the said Louis B. Houck, or any other official or employee or agent of the said Louis B. Houck or of the said railroad companies named above, or of any defendants named herein above; that you take and deliver to the said receiver all of the engines and cars and other equipments of the said railroad or railroads, all of its books and papers, its tickets and other movable property, its depots and ticket offices, and every other property of every description. You are further commanded that you immediately take into your custody the body of the said Louis B. Houck, and him safely keep, so that you have him, the said Louis B. Houck, before me, at chambers, in the city of Poplar Bluff, in the county of Butler and state of Missouri, on Thursday, April 16, 1896, then and there to show cause, if any he can, why he should not be committed to the common jail of said Dunklin county for his disobedience of my said order of appointment of said receiver. And you are further commanded that if any other person shall attempt to obstruct the full and free execution of the above order, or to aid or assist in the attempt to remove any of the said property from the said county of Dunklin, except by orders of the said receiver, you shall, by virtue hereof, arrest each and every such person, and have him or them before me at the time and place designated above, then and there to be further dealt with according to law. In testimony whereof, I have

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hereunto set my hand, at chambers, in the town of Bloomfield, in the county of Stoddard and state of Missouri, this 14th day of April, 1896. JOHN G. WEAR, Judge of the Circuit Court of Dunklin County, Missouri."

The return of the sheriff upon the above writ follows:

" Executed the within writ in the county of Dunklin and state of Missouri on the 14th day of April, 1896, by placing S. W. Fordyce, as receiver, in charge of the depot and all of the property of the above-named company or companies which were at that time at the town of Kennett and in said county, including one engine and two passenger coaches, which were afterwards taken away by L. B. Houck, and carried eastward into Pemiscot county, Missouri. I did further on the 15th day of April, 1896, put the said receiver in charge of all the remainder of the property of the said companies or company in my said county. Said Louis B. Houck was not arrested as ordered above, because he left the said county of Dunklin. W. G. Petty, Sheriff of Dunklin County, Mo."

Other necessary facts appear in the opinion of the court.

M. R. Smith, for plaintiffs.

BARCLAY, J. (after stating the facts).—This action is original in the supreme court. The plaintiffs are the St. Louis, Kennett & Southern Railroad Company, Louis Houck, and a number of other shareholders in said company. The defendants are the learned circuit judge of the Twenty-second circuit, and Messrs. Kerfoot and Fordyce, plaintiff and receiver in the proceeding before the judge. The object of the action is to obtain a writ of prohibition against the enforcement of certain orders entered by the judge in vacation of the court. Copies of those orders will be printed in the official report. The claim of plaintiffs here is that the orders are void, because made without jurisdiction, or, at least, that they are in excess of any jurisdiction which the circuit judge might properly exercise in the proceeding as it then stood. In response to a preliminary rule in prohibition, defendants made separate returns, and plaintiffs replied thereto. It will not be necessary to state the terms of those pleadings at any great length. The facts on which the result of the action in this court depends are few, and need not be obscured by elaboration of the minor features of the controversy. Those facts are also admitted by the pleadings. The old St. Louis, Kennett &

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Southern Railroad Company (which we shall call the "Old Kennett Road" for a short name) was incorporated in 1890 to operate a railroad, about 19 miles long, between Campbell and Kennett, in Dunklin county. A new company of the same title was formed in 1895 by an alleged consolidation of the old Kennett Road and the Pemiscot Railroad Company, which had been organized in 1892 to extend the railroad from Kennett to Caruthersville. The latter place is in Pemiscot county, on the Mississippi river. The validity of that consolidation is attacked in the petition filed in the case on the circuit. The ostensible public evidence of the consolidation is the certificate issued by the secretary of state of Missouri, proclaiming a compliance with the statutory requirements in regard to the union of such corporations. Rev. St. 1889, § 2567. The property formerly owned by the two old companies was in custody of the new Kennett road, which operated a line, about 44 miles in length, from Campbell to Caruthersville (*via* Kennett), when Kerfoot's petition was filed. For the purpose of the hearing in this court, the version which that petition gives of the dealings between Kerfoot, Houck, and the companies will be accepted as reliable in determining the propriety of the proceedings which followed. The statements of that petition need not be repeated. They will be referred to as occasion requires. An *ex parte* application for the appointment of a receiver was made to the circuit judge, in vacation, on representations additional to the petition. The substance of those representations is that if such appointment were not made the property of said railway companies would "be wasted pending the determination of the said litigation," and the rights of the plaintiff "suffer irretrievable injury," etc. The application excused the want of notice thereof to defendants on the ground "that the giving of the said notice would tend to defeat the object sought to be obtained by the said appointment, in this, to wit: that the said Louis Houck is in exclusive charge of all of the books showing the condition of the affairs of the said companies, and has persons in charge of the various offices and property of the road, who are entirely under his control; that the said Louis Houck would so handle and dispose of the books and property of the said companies that the order of appointment of a receiver, if made upon notice, would not avail, and would not be obeyed; the books and movable property of the said

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companies would be removed from the said counties in which said property is situate, and would be removed from the state, so that the said processes of the said court would not be effectual to compel the delivery thereof to the receiver which might be appointed "; " that by the removal of the said books of the said companies the object of the appointment of such receiver would be frustrated, and his performace of his said duties would be made difficult, if not impossible; that all of the said defendants, directors in the said corporations, are under the control of the said defendant Louis Houck "; and " that, if the said defendants should have notice of this application for a receiver, they would resort to various tricks and devices to delay this proceeding, and in the meanwhile to further wreck said property; that the said defendants now are plotting to deprive this plaintiff of his property interest in the St. Louis, Kennett & Southern Railroad Company, by means of a fictitious and fraudulent assessment upon his said stock; and that the giving of the said notice would have the effect to destroy the benefits sought in the appointment of the said receiver." The circuit judge granted the application, without notice to defendants, and made a vacation order, at Poplar Bluff, in Butler county, the terms of which are set forth at large in the statement accompanying this opinion. The main features of the order are that Mr. Fordyce was appointed receiver of all the real and personal property of defendant companies. He was directed to immediately qualify, by giving bond, etc., and then to take charge of all the real and personal property of said companies, " including the rolling stock, the depots, books and papers, of the said companies "; to " manage the said railroad properties carefully," and " continue to fulfill and perform all of the existing contracts of the said railroad companies until the further order of the court in the premises "; to keep accounts, make reports, etc. The order further directed defendants to deliver all said property to said receiver, and enjoined them from interfering with the possession of the latter. The defendants were further ordered to appear before the judge " at the next term of the circuit court in the county of Dunklin," then and there to show cause why the receivership should not be continued " pending a hearing upon the merits." This order was dated April 11, 1896. The next term of the Dunklin circuit court, as appointed by law, will begin on the

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second Monday (the 13th) of July, 1896. Sess. Laws 1892, p. 13, § 50. An ordinary summons to defendants to appear and answer the petition in the cause at the opening of the July term of the circuit court of Dunklin county was issued on the 10th of April, 1896. Mr. Fordyce, at the time of his appointment as receiver, was president of the St. Louis Southwestern Railroad Company, popularly known as the "Cotton Belt" route. It is alleged in the petition for prohibition in this court that the latter is "a competitive railroad company, whose policy has ever been hostile to relator railroad company, for the reason that it occupies the same territory for business," and that the connection of the Kennett road with the Mississippi river secures to the people of Dunklin and Pemiscot counties advantages of competition between that road and the Cotton Belt. There is no denial of these allegations in the return of any of the defendants to the preliminary rule in this court, and like statements as to the roads being in competition appear in the replies to the returns. The above recital shows the substance of the charges on that point. When Mr. Fordyce, in obedience to the order for his appointment, demanded possession of the Kennett road, the officers in charge of the property refused to deliver it. That demand was the first actual notification given to them of the receivership. After the refusal to turn over the property, an application was made to the circuit judge for further action, whereupon he issued the writ of warrant of date April 14, 1896, to the sheriff of Dunklin county, directing him to summon the power of his county to put the receiver in possession of the property of the two railroad companies, and to dispossess any official of said companies. The warrant is recited in full in the statement accompanying the opinion. But it may be properly noted here that the warrant was issued in Stoddard county. It directed the arrest of Louis B. Houck, and that he be produced before the circuit judge, at chambers, in the city of Poplar Bluff, Butler county, April 16, 1896, to show cause why he should not be committed to jail for disobedience of the order appointing the receiver. Under the last-described writ, the sheriff put Mr. Fordyce, as receiver, into possession of the property of the Kennett railroad in Dunklin county, and otherwise returned the order unexecuted, for the reasons appearing in his return. At that stage of the

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case the application for a prohibition was presented to the supreme court, and a preliminary rule issued.

1. It is urged by defendants that prohibition is not applicable to the situation existing on the circuit in the receivership case, and that no review can occur at this time as to the propriety of the disputed orders. But, if **Prohibition.** those orders were beyond the legitimate authority of the judge, the enforcement of them may be prohibited. *Morris v. Lenox*, 8 Mo. 252. The fact that the suit in the circuit court invokes the equity powers thereof does not preclude the use of a prohibitory writ to keep the judicial action within the limits marked by law. A court of equity, no less than a court of law, may be called back within the boundaries of its rightful jurisdiction by the process of prohibition. Where a court or judge assumes to exercise a judicial power not granted by law, it matters not, so far as concerns the right to a prohibition, whether the exhibition of power occurs in a case which the court is not authorized to entertain at all, or is merely an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by the court or judge in question. *State v. Walls*, 113 Mo. 42; *In re Holmes*, (1895) 1 Q. B. 174. Prohibition, however, will not ordinarily be granted where the usual modes of review by appeal or writ of error furnish an adequate and efficient remedy for the correction of an injury resulting from the unauthorized exercise of judicial power. But where those remedies are inadequate to the exigency of the situation, in a particular case, a supervising court may properly interfere by the remedy now asked. If the orders in the Kerfoot suit were in excess of the jurisdiction of the learned judge who entered them, and if they have resulted in the seizure of a large part of a railroad line, and its detention from those entitled to—and whose duty requires them to—operate it for the convenience of the public, the case is one which would permit, if not demand, the application of a writ of prohibition to correct the wrong complained of. The remedy of prohibition affords opportunity for a direct attack upon proceedings questioned upon the point of jurisdiction. If the facts shown by a record reveal an unwarranted application of judicial power, causing an immediate and wrongful invasion of rights of property, the writ of prohibition may go to check the execution of any unfinished part of the extrajudicial programme that may have been

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outlined. Sometimes the writ may be so shaped as to undo the steps that have been taken in such a programme. To justify the use of the writ, it is not essential that the proceedings in dispute should be so entirely void as to warrant a declaration of nullity upon a collateral inquiry. The statute governing proceedings in prohibition makes no change in the ancient law on these points. Laws 1895, p. 95.

2. The plaintiffs in this court contend that the learned judge had no jurisdiction to appoint a receiver for the railroad company upon the showing made by the petition of Kerfoot, and that the order of appointment is therefore a nullity. It is true that there are precedents declaring that, in the absence of statutory authority for so doing, the property of a solvent and going corporation cannot rightfully be taken from the control of its officers at the suit of a mere creditor at large, and be placed in the hands of a receiver, on account of mismanagement merely, or to secure the performance of some engagement of the company, even in regard to its shares. Some decisions have gone so far as to correct, and even to prohibit, such proceedings, as entirely beyond the general jurisdiction of courts of equity. *Port Huron & G. R. Co. v. Judge of St. Clair Circuit*, 31 Mich. 456; *Iron Co. v. Wilder*, 88 Va. 942; *Mason v. Supreme Court of Baltimore City*, 77 Md. 483; *In re Binghamton General El. Co.*, 143 N. Y. 261; *People v. Weigley*, 155 Ill. 491; *State v. Superior Court of Pierce County*, 12 Wash. 677; *Fischer v. Superior Court of San Francisco*, 110 Cal. 129. But in view of the other serious and sufficiently difficult question involved in the case at bar, and the desirability of prompt announcement of the conclusion that has been reached, we shall not now stop to investigate the soundness of plaintiffs' contention above stated.

3. A power to appoint receivers is expressly conferred upon judges of trial courts in vacation by section 2193, Rev. St. 1889, which greatly broadened the terms of the old law (Gen.

Vacation. St. 1865, p. 678, § 52), under which *State v. Gambs*, (1878) 88 Mo. 289, was decided. We

shall not be obliged to consider whether the judge might not appoint a receiver in vacation by virtue of inherent power in the circuit court to make such an order, for in the instance under review the order was made in another county than that in which the petition for a receiver had been filed. The

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inherent as well as the express powers of a court must be exercised within the territorial jurisdiction of that court, unless positive law enlarges the field of their use. But, where a judicial power is given by statute to a judge in vacation, he may exert that power (at least within his circuit) out of as well as in the county where the cause is pending, unless there is something in the statutory authority to forbid such action. It may be conceded for the present, without examining the proposition closely, that the power given to the judge to appoint a receiver carries with it, as a necessary incident, a power in his court, if not in the judge personally, to enforce obedience to orders made within the ambit of that power, and in accordance with established principles of law governing the exertion of such a power. (As to the mode of applying that power we shall have more to say in the next section of this opinion.) But the judicial authority to deal with property by means of a receivership is not unlimited or absolute. *Harris v. Beauchamp*, (1894) 1 Q. B. 801. By a very late statute of Missouri an appeal may be taken from any order "refusing to revoke, modify or change an interlocutory order appointing a receiver or receivers." The same statute further provides for a very summary determination of such appeals, and for that reason directs that they shall, on Ex parte proceedings. motion, be advanced on the appellate docket. Laws 1895, p. 91, amending Rev. St. 1889, § 2246. The purpose of this enactment is to moderate the hardships resulting from the long continuance of receiverships granted on insufficient grounds, when no review of interlocutory appointments was permissible. The reports of court proceedings in the United States prior to the passage of that act afforded illustrations of the injuries possible from erroneous judicial action in the matter of receiverships,—injuries for which the law seemed to afford no adequate redress. The right to a summary review of an interlocutory order maintaining a receivership is clearly given by the statute cited. It is a valuable and substantial right. The administration of the law must conform to the intent of the legislature in regard to it. *Andrews v. National Foundry & Pipe Works*, 61 Fed. Rep. 782. It is noticeable that a prompt review is allowed by the act of 1895 only where the order continues, not where it dissolves, the receivership. Thus the statute is plainly aimed at the possible abuse of maintaining a receivership (without

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just grounds) beyond a period required for an investigation of its correctness. If the purpose of the new law is kept in view and effectuated, the procedure in such cases must be shaped so as to permit a speedy review of interlocutory orders appointing receivers in vacation as well as in term. Otherwise such orders, in many parts of Missouri, might stand for nearly half a year without the possibility of even a first review, under the existing law in regard to terms of court. Laws 1892, p. 10, § 30 and following. In other states where statutes allow appeals from interlocutory injunction orders, appointments of receivers, etc., it has been held that the appeals may be taken in vacation as well as in term. *Griffin v. Bank*, 9 Ala. 201; *Montana, etc., Co. v. Helena, etc., Co.*, 6 Mont. 416; *Railroad Co. v. Dykeman*, 133 Ind. 56. Such rulings appear necessary to conform to the plain design of the legislation on that subject. The new provisions in this state most clearly import that persons whose possession is to be invaded by a receivership shall have at least a prompt and full opportunity for a hearing (both preliminary and by appeal) as to the justice and equity of such a drastic remedy. Keeping the purpose of the new statute in mind, how must we regard the orders of the learned circuit judge in the Kerfoot suit? The appointment of the receiver was made without notice to, or any hearing of, the defendants. They had no opportunity to offer the facts which they assert, tending to prove that the demand for any sort of receivership was without foundation. The learned judge's order fixed a time, three months distant, at which they might show cause why the receivership "should not be continued, and the property kept by the said receiver, pending a hearing upon the merits." The details of the order plainly contemplate that meanwhile the railroad was to be operated and managed by the receiver; at least, until the next term of court, then three months off. The receiver was directed, for instance, to perform existing contracts "until the further order of the court." The whole framework of the order suggests that the receivership was established for at least a three-months term. The facts which justify the appointment of a receiver, without notice to the party whose possession is disturbed, are exceptional, at best. Nothing but the plainest showing of an imperative necessity for such an order, to prevent a failure of justice, should move a court to grant a motion to that end, though there is no hard

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and fast rule, that we can give, prescribing when the discretionary power to make such an order may or may not be used. But of this proposition we feel sure: that under our existing law no temporary receivership can rightly be set up, to last three months, without affording first a hearing to the party whose possession of property is determined by such an order. If the court had been in session, so as to permit immediate application to modify the order, the relief then possible might affect the applicability of a prohibitory writ. But the facts here are different. In vacation, at least, a party should not be obliged to hunt up the judge for a correction of an order made in excess of his power in the premises. The right to appoint a temporary receiver in vacation is limited by the necessity from which alone the right to make such appointment springs. *Larsen v. Winder*, (Wash., 1896) 44 Pac. Rep. 123. No court in Missouri may, without notice, declare a receivership, pending suit, for a longer time than is fairly and reasonably requisite to allow the defendant, whose possession is invaded, to show cause against a further continuance of the receivership. What is such reasonable time will depend on the circumstances of each case. But we have no doubt that three months is beyond (and very far beyond) any reasonable day for the showing of cause. The statute allowing appeals from interlocutory receivership orders must be given due force. It contemplates that an early opportunity shall be allowed to combat, and, if desired, to review, the appointment. The courts must yield to that obvious purpose, and permit no receivership to stand without a summary opportunity to review the equity of it. When a judge in vacation deems the exigency sufficiently great to warrant an *ex parte* order for a receivership of property, such as that in question here, he should by the same order appoint a very early day for the showing of cause against the order by defendants, so that the latter may then have opportunity for the motion to vacate which the statute permits. Our law confers, indeed, power to appoint a receiver in vacation, but it also allows an appeal from an order refusing to vacate an interlocutory appointment. A reasonable construction of the latter act would appear to permit in vacation a motion to revoke the appointment in vacation; otherwise one of the chief remedial objects of the appeal statute on this subject would be frustrated. It has been held by some courts that a

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power to do a certain judicial act out of term implies a power to undo that act, if justice appears to require that move. Railroad Co. v. Sloan, 31 Ohio St. 1; Walters v. Trust Co., 50 Fed. Rep. 316. We hold that the learned judge's order in the case on the circuit was in excess of the limitations on the power of appointment without notice, which we think the law imposes by the clearest implication.

4. But another patent infirmity is noticeable in the proceedings in question. Had the first order fixed a reasonable date to show cause against it, the question of the jurisdictional validity of the second order (the order to the sheriff) would demand serious attention. That order was made after the refusal of the superintendent of the new Kennett road to surrender possession to the receiver. The petition
**Party to
action.** itself gave notice that the property over which the receivership was sought to be established was in possession of the new company by virtue of the alleged consolidation. The old Kennett Company and its directors were parties defendant in the petition. The new company was not a party to it, for the list of directors shows that only the old company was pointed out as defendant. The receivership asked of and granted by the court reached for the property of the old Kennett Company, and of the Pemiscot Railroad Company. The directions to the receiver exhibit that meaning of the order quite clearly. Then it was evidently beyond the power of the learned judge to order a seizure of property in the possession of the new company without at least giving the latter an opportunity to show cause against the proposed order. By that order the learned judge virtually decided that the transfer to the new company was invalid, and the union of the two old companies merely nominal. That ruling was made without any but an *ex parte* hearing, as against a stranger to the case in court. The order to the sheriff was in the nature of a writ of assistance, as known to the chancery practice. Such a writ could not rightly be issued, even on a final decree (and, for stronger reason, not upon an *ex parte* interlocutory order), as against one not a party to the suit, without a chance to the latter to show cause against the order therefor. People v. Rogers, 2 Paige 103; Howard v. Railroad Co., 101 U. S. 848; State v. Ball, 5 Wash. 387, 31 Pac. 975. The summary writ, issued from another county, to seize the property and deliver it to the receiver, was beyond

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the jurisdiction of the learned judge, so far as it concerned or affected the rights of the new Kennett Company; and, as to the latter company, the effect of the writ should be checked by the prohibition now invoked.

5. The fact that no objection was made on the circuit to the want of jurisdiction is no barrier to a prohibition, where the order complained of was entered in vacation, *ex parte*, and the defect of jurisdiction appears on the face of the papers. Nor can the want of an exception to the objectionable order have any weight where no opportunity to except was had by reason of the *ex parte* nature of the order.

6. Assuming that the learned judge was without jurisdiction to require the immediate delivery of the property of the new Kennett Company to the receiver without a hearing, then the disobedience of the order by Contempt. Mr. Houck, as superintendent of that company, involves no contempt. It is always permissible to show, upon process for contempt, that the order disobeyed was beyond the jurisdiction of the authority from which it emanated. If that showing is successfully made, no punishable contempt has been committed. *In re Sawyer*, 124 U. S. 200; *Smith v. People*, 2 Colo. App. 99; *Schwartz v. Barry*, 90 Mich. 267; *State v. Winder*, (Wash., 1896) 44 Pac. 125.

7. It is insisted by the plaintiffs in this court that the action of the learned circuit judge was void because the appointee named as custodian of the property could not lawfully be appointed receiver of their railway line.

The constitution declares that: "No railroad or Manager as receiver. other corporation, or the lessees, purchasers or managers of any railroad corporation, shall * * * in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line. The question whether railroads are parallel or competing lines shall, when demanded, be decided by a jury, as in other civil issues." Const. 1875, art. 12, § 17. Two sections of the statute law, in furtherance of the purpose of the organic law quoted, are as follows: "It shall be unlawful for any railroad company, corporation or individual owning, operating or managing any railroad in the state of Missouri, to enter into any contract, combination or association, * * *

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or in any way whatever to any degree exercise control over, any railroad company, corporation or individual owning or having under his or their control or management a parallel or competing line in this state, but each and every such railroad, whether owned, operated or managed by a company, corporation or individual, shall be run, operated and managed separately by its own officers and agents, and be dependent for its support on its own earnings from its local and through business in connection with other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition." Rev. St. 1889, § 2569. "It shall be unlawful for any officer of any railroad company or corporation, or any individual owning, operating or managing any railroad in this state as a common carrier, to act as an officer of any other railroad company or corporation owning, operating or managing, or having the control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall be decided by a jury, when so demanded." *Id.* § 2570. At various points in the state statutes concerning railroads receivers are mentioned among other managing operators of such lines. Rev. St. 1889, §§ 2631, 2644, 2645. So that it is obvious that the president of a parallel or competing railroad, however high his business qualifications, is not eligible to appointment as receiver of the competing railway line, in Missouri. The fact is alleged in this court that Mr. Fordyce is the president of the Cotton Belt Route, and that it is a railway in competition with the new Kennett road. The fact stands admitted by the pleadings here, in their present form. But, to make it available as the groundwork of a prohibition, the fact should appear in some way in the proceedings on the circuit. It does not appear in the record of those proceedings. Nor does it appear that the learned circuit judge was aware of the fact when the appointment was made. Hence we are not called upon to say whether or not the fact would furnish of itself a cause to prohibit the execution of the order of appointment.

8. The summary order for the seizure of the property in possession of the new Kennett road was, we think, in excess of the rightful power of the learned circuit judge in vacation. We hence consider that the rule in prohibition should be made absolute, and direct that judgment for a peremptory writ be entered, prohibiting the circuit judge from enforcing

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any order heretofore made in the Kerfoot case, under which said receiver has taken possession, or is attempting to take possession, of some part of the railway or other property of the St. Louis, Kennett & Southern Railroad Company, or of the Pemiscot Railroad Company, and prohibiting him from making any order (upon the pending petition of said Kerfoot in said cause) directing or permitting any receiver to take possession of any property of said companies without first allowing the present St. Louis, Kennett & Southern Railroad Company an opportunity to be duly heard; and by the writ the said receiver will be prohibited from attempting to take or hold possession of any property of said railroad companies by virtue of said order, and the receiver will further be ordered to restore forthwith any and all property of the new Kennett road that may be in his possession by reason of his said receivership.

BRACE, C.J., and GANTT, MACFARLANE, BURGESS, and ROBINSON, JJ., concur. SHERWOOD, J., dissents.

DENVER TRAMWAY CO.

v.

NESBIT.

(*Supreme Court of Colorado, April 20, 1896.*)

Assumption of Risk.—The conductor of a street railway who voluntarily remains in the employ of the railway company, when he knows that the cars are not provided with life guards, assumes all the risks of consequences arising from such defect, and waives the right to recover for injuries caused thereby.

APPEAL from Arapahoe county district court. *Reversed.*

Action to recover damages for personal injuries caused by defendant's negligence. On September 24, 1890, the plaintiff, William J. Nesbit, was employed by the Denver Tramway Company in the capacity of Case stated. conductor on its street cars. On October 17, 1890, in the morning, he took charge of a train consisting of a motor and

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trail car, and was engaged in operating the same upon the company's Lawrence Street line. On the third trip, while the train was going at a speed of from 12 to 14 miles an hour, in attempting to pass from the motor to the trail car, he fell to the ground, and the hind wheel of the trailer passed over his foot and ankle, causing serious and permanent injuries. Nesbit's statement as to how the accident occurred is undisputed, and is as follows: "I was passing from the motor to the trailer in order to collect a fare or fares, and I had hold with my right hand of the hand rail of the motor car; and I swung around in the usual way to catch hold of the hand rail of the trailer car, and thus transfer my hold. I came in contact with the hand rail of the trailer car, and thought I had it for the instant, but, just as I was transferring my hold, the motor gave a sudden bound up, and threw my hand so high I missed the trailer, and fell." The negligence charged against the company, and which it is claimed by plaintiff was the proximate cause of the injury, was the failure to have what is termed a "life guard," or "fender," on the trail car, which extends around from the front to the rear, from six to nine inches outside the wheels, and so near the ground as to prevent a person's foot from passing under and onto the track. Upon the conclusion of the testimony, defendant asked the court to instruct the jury to find for defendant, which was denied. Motion for new trial denied, and judgment entered on this verdict, from which the company appeals.

A. M. Stevenson, for appellant.

Thomas, Bryant & Lee, for appellee.

GODDARD, J. (after stating the facts).—From the undisputed facts in this case, it appears that the appellee was engaged as conductor in operating a train of cars on appellant's street railway, and, while the train was in rapid motion, attempted to step from the rear of the motor to the trail car, and, by reason of the sudden bobbing up of the motor at the time, missed the hand rail on the trailer, and fell in such a way as to bring his foot and ankle under the rear wheel of the trailer. There was no fender or life guard on the trailer, and the company at the time was using trail cars both with and without the guard. Its absence or presence was open to observation, and easily discernible by the most casual inspec-

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tion. Upon these conceded facts, we think it was the duty of the trial court to have withdrawn the case from the consideration of the jury, and have determined, as a matter of law, that they were insufficient to show liability on the part of the company.

Aside from the question whether the conduct of the appellee in attempting to pass from the motor to the trail car while the train was running at a rapid rate of speed, and his fall under the circumstances, was not the proximate cause of the injury, there are apparent other and controlling reasons which exempt the company from liability. Its failure to place a guard upon the trail car cannot be said to constitute negligence *per se*, and, whatever weight may be given to such failure as a factor conducing to the injury of a stranger, it certainly constituted no breach of duty on the part of the company towards its employees to operate its cars without such guard. In other words, an employer is under no implied obligation, by the contract of employment, to furnish any particular kind of machinery, or to adopt the latest improvements and appliances. He is only bound to see that that which he does employ is reasonably safe and suitable for the purpose for which it is designed. Wood, Mast. & Serv. 690; Railway Co. v. Smith, 18 Ill. App. 119; Railway Co. v. McCormick, 74 Ind. 440; Railway Co. v. Gildersleeve, 33 Mich. 133. While the want of a life guard may have enhanced the risk incident to appellee's employment, it did not constitute such a defect in the construction of the car as to render it unsafe or unsuitable for the business in which it was employed. As was said in Sweeney v. Envelope Co., 101 N. Y. 520: "In the absence of defective construction, or of negligence or want of care in the reparation of machinery furnished by him, the master incurs no liability from injuries arising from its use. The general rule is that the servant accepts the service subject to the risks incidental to it; and where the machinery and implements of the employer's business are at the time of a certain kind, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards." But even conceding that the want of a life guard rendered the car defective, and the company was guilty of a breach of its duty in failing to supply it, and in operating the train without it, such defect was certainly obvious, and one that the appellee could not have failed to

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observe if he had used his eyesight, and one that was as open and patent to him as to the company; and, if danger was to be apprehended from the use of a car in that condition, that result was equally apparent to him. Under these circumstances, he was precluded from recovering, by the well-settled rule that an employee assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed that are open and obvious, or that would have been known to him had he exercised ordinary diligence. By voluntarily continuing in the service with knowledge, or means of knowledge, equal to his employer's, of any defect in the appliances or the machinery used, and without objection, or promise on the part of the employer to remedy the defect, the employee assumes all the consequences that result from such defect, and waives the right to recover for injuries caused thereby. *Rogers v. Railway Co.*, 76 Tex. 502; *Railway Co. v. Bradford*, 66 Tex. 732; *Power Co. v. Murphy*, 115 Ind. 566; *Sullivan v. Manufacturing Co.*, 113 Mass. 396; *Quick v. Iron Co.*, 47 Minn. 361; *Brewer v. Railway Co.*, 56 Mich. 620; *Moulton v. Gage*, 138 Mass. 390; *Railway Co. v. Flanigan*, 77 Ill. 365; *Ladd v. Railway Co.*, 119 Mass. 412; *Whart. Neg.* § 214, and cases cited; *Wells v. Coe*, 9 Colo. 159. Applying this rule to the facts of this case, it is clear that appellee was not entitled to recover, and the court below erred in refusing to direct a verdict for defendant. The judgment is reversed, and cause remanded. Reversed.

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v.

FITCHBURG R. CO.

(Supreme Court of Wisconsin, May 1, 1896.)

Evidence of Insolvency.—There was evidence that a corporation bought lumber, for which it failed to pay for ten months after payment was due, and after demand had been made; that the seller attempted to collect the amount due, and found that there was no such corporation at the

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place named in the order for the lumber as the place of business of the corporation, nor did the name of the corporation appear in the city directory. *Held*, that such evidence constituted sufficient *prima facie* proof to sustain a finding of insolvency so as to justify the stoppage of the goods in transit by the seller.

Goods Held by Carrier—Stoppage in Transit.—Where there is evidence that lumber, after reaching its destination, had been stored away by the carrier and held for the payment of freight and charges, it justifies the conclusion that the carrier holds such lumber as a carrier, and not as a warehouseman, nor as agent for the consignee, and the lumber is subject to stoppage *in transitu*.

Delivery of Portion of Consignment Does Not Operate as Delivery of the Whole.—The fact that a part of a consignment of lumber held by a carrier for freight and charges was delivered does not operate as a delivery of the whole consignment, if an intention to that effect is not clearly shown.

APPEAL from Rock county circuit court.

This was an action for the conversion of 18,679 feet of lumber sold and consigned by the plaintiff to the J. B. Dixon Lumber Company, of Boston, in December, 1890, and which arrived in Boston over the road of the defendant company, and was placed in its warehouse for delivery to the consignee. It further appeared at the trial before the court that the bill for the lumber became due February 15, 1891, but the lumber had never been paid for; that a bill had been sent for collection in the spring of 1891. M. G. Jeffris testified to finding the lumber in one of the sheds of the defendant company, December 21, 1891, and to a conversation with one Simons, the freight agent of the defendant, who said that the lumber was there; that it had not been delivered because the freight had not been paid; that he then informed the freight agent that the J. B. Dixon Lumber Company had never paid for the lumber, and that he represented the plaintiff, and desired to stop the lumber then and there in transit, and to take it; that he told him that he had looked in the Boston directory, and had gone where the said company was supposed to be, but could find no such concern in Boston, as he testified was the fact; that he was informed that the charges on the lumber were for freight \$124.98, storage \$97.50, and he offered to pay the charges and take the lumber; that he said he could not take it, and could not let him have the lumber, on the ground that the defendant did not know whom it belonged to, and he would have to bring an action of replevin, and let the court decide;

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that he told Simons that there was no such concern as the J. B. Dixon Lumber Company; that he had been over to where they did business, and the only man there told him that there was no such concern, but that it was J. B. Dixon (as he testified was the fact); and asked, if he got an order from said Dixon, if he would deliver the lumber, to which he replied, "No," that he would have to have an order from the J. B. Dixon Lumber Company; but he finally said such an order would not do; that the plaintiff would have to bring an action of replevin. On behalf of the defendant it was shown by one Cooper that he was formerly connected with the J. B. Dixon Lumber Company during its continuance in business up to February, 1891; that the car of lumber in question arrived at Boston in due course, and they were advised of it. The lumber was removed from the car and, not being taken away at the proper time, it was stored in the old shed of the company in its upper loft. About one-fourth of the lumber was taken away, and sold to the New Bedford Casket Company in November, 1890. J. B. Dixon was the president of the Dixon Lumber Company. The witness identified, as in his handwriting, an order produced by the defendant's counsel, and offered in evidence, as follows: "Boston, March 9, 1891. Fitchburg R. R.: Please deliver to F. C. Bill the pine lumber from car 1863 on payment of freight and charges. J. B. Dixon Lumber Company." He testified: "It was the custom and understanding between the J. B. Dixon Lumber Company and the Fitchburg Railroad Company that any lumber that arrived over the Fitchburg Railroad was stored by the railroad company at the risk of the lumber company, and that the lumber company had a right to and did remove it whenever it was convenient so to do, subject to the payment of the charges of the railroad company. All such lumber was placed subject to the order and control of the J. B. Dixon Lumber Company on the payment of the charges of the railroad company." One Crowell testified that he surveyed the lumber in question at the request of Simons, the local freight agent of the defendant, in April, 1892; that it was in the old shed, door 4. When he surveyed it, he removed it to the bay underneath, and it amounted to 13,280 feet; and it was shown that it had remained there ever since. Simons, the local freight agent of the defendant, testified that he knew of the car of lumber, and to the amount of charges on the

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lumber. He was asked: What has been the custom of the Fitchburg Railroad Company and the J. B. Dixon Lumber Company, or the understanding between them, in regard to the leaving of said lumber in the sheds and yards of said company in Boston? Answer. It may be left in the sheds at their expense and risk, to be taken away by them at any time, upon payment of freight and charges. This has been the custom of all the railroads terminating in Boston for many years. William Clancy, manager and proprietor of the Lumber Mercantile Association in Chicago, testified to making a demand of payment by letter in December, 1891, of the plaintiff's bill for the lumber. The claim was not paid, but returned by said company to the plaintiff. The court found that the lumber in question, 13,280 feet, had never been delivered to the J. B. Dixon Lumber Company, and that said company became and was insolvent December 21, 1891; that it never paid for such lumber; that the plaintiff on the day last mentioned claimed the right to stop said lumber by reason of the failure of said company to pay for the same, and demanded it of the defendant, offering to pay its charges thereon; that the defendant refused to deliver it, and converted it to its own use; that the value of the lumber was \$305.14, and the amount of defendant's charges for freight and storage was \$222.28, and that the plaintiff was entitled to stop said lumber, and to possession of the same, on payment of such charges, of which tender had been made December 21, 1891, and judgment was given in favor of the plaintiff against the defendant for \$83.16, the difference between the value of said lumber and said charges, with interest from December 21, 1891, with costs, from which the defendant appealed.

Jackson & Jackson, for appellant.

Fethers, Jeffris, Fifield & Matheson, for respondent.

PINNEY, J. (after stating the facts).—1. It is insisted that the finding that the J. B. Dixon Lumber Company was insolvent was without any evidence to support it, and that, therefore, the claim of the plaintiff to exercise the right of stoppage *in transitu* of the lumber, Decem-
ber 21, 1891, was without any warrant or foundation. The sale of the lumber by the plaintiff to that company occurred in the early autumn of 1890, and the purchase price became

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due February 15, 1891. This was a just and undisputed debt. Effort to collect it had proved unavailing, and the purchaser had wholly failed to respond to its obligation for a period of over 10 months. Investigation then made showed that there was no such concern located at or about the alleged place of its business, and it was not named in the city directory. The person in charge where it had done business stated that there was no such concern, but that it was J. B. Dixon. The witness Cooper, examined by the defendant, testified that J. B. Dixon was the president of the J. B. Dixon Lumber Company, and that he (witness) was connected with the company "during its corporation, so to speak,—not exactly in its literal sense,—during its continuance in business up to about the 1st of February, 1891." The just inference is that this company was a corporation, and that it had suspended business February 1, 1891, a few days before the plaintiff's debt matured. Strict proof of insolvency is not required in order to justify the exercise of the right of stoppage *in transitu*. "By the word 'insolvency' is meant a general inability to pay one's debts; and of this inability the failure to pay one just and admitted debt would probably be sufficient evidence." Benj. Sales, § 837; Smith, Merc. Law, 550, and note. It had failed to pay the just and undisputed debts it had owed to the plaintiff and to the defendant for over 10 months. Inquiry made at the former place of business of the debtor elicited the information that there was no such concern; that it was only J. B. Dixon; and the fact that the witness Cooper, connected with it during its corporate existence, and having some knowledge of its business, called to show that the right of stoppage had been terminated by delivery to the company or its agent, was not interrogated as to its solvency, is quite suggestive, in view of the facts in evidence, when fairly satisfactory proof of its solvency would have been fatal to the plaintiff's action. The evidence constitutes sufficient *prima facie* proof of insolvency to sustain the finding. There was no attempt made to dispute this evidence, or to rebut it. We must hold that the evidence was sufficient to warrant the finding.

2. Had there been a delivery of the lumber, in view of the evidence, to the consignee, or to an agent of the consignee, so that the defendant had no longer any possession or control of it as carrier? The lumber had reached its ultimate destina-

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tion, and the controversy is really reduced to the question whether the defendant held it as carrier or as the agent and warehouseman of the consignee. It may be properly said that the possession of the lumber by the defendant was ambiguous, and that it is necessary to gather the intention of the parties from their acts, and the effect the law imputes to what they have done. It is said that nothing prevents an agreement by the carrier to hold the goods after arrival at destination, as agent of the buyer, though he may at the same time say, "I shall not let you take them till my freight is paid." The question is one of intention, and in *Whitehead v. Anderson*, 9 Mees. & W. 518, the captain was held not to have intended such an agreement by telling the assignee that he would deliver him the cargo when he was satisfied about the freight; PARKE, B., saying: "There is no proof of such a contract. A promise by the captain to the agent of the assignee is stated, but it is no more than a promise, without a new consideration to fulfil the original contract, and deliver in due course to the consignee on payment of freight, which leaves the captain in the same situation as before." Benj. Sales, § 853. The existence of the carrier's lien for unpaid freight it is held raises a strong presumption that the carrier continues to hold the goods as carrier, and not as warehouseman; and in order to rebut this presumption there must be proof of some arrangement or agreement between the buyer and the carrier whereby the latter, while retaining his lien, becomes the agent of the buyer to keep his goods for him. *Ex parte Barrow*, 6 Ch. Div. 783. In *Ex parte Cooper*, 11 Ch. Div. 68, it was held that: "Where goods are placed in the possession of a carrier to be carried for the vendor to be delivered to the purchaser, the *transitus* is not at an end so long as the carrier continues to hold the goods as carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent." Unless something equivalent to an attornment on the part of the carrier to the consignee is shown, so that he has altered his position, and holds the goods in another capacity, the *transitus* is not at an end. No doubt, where the carrier enters into a new contract with the consignee, distinct from the original contract of carriage, to hold the goods for him as his agent in a new character for the purpose of custody on his account, the

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transitus would be at an end, and the goods constructively in the possession of the consignee. *McLean v. Breithaupt*, 12 Ont. App. 383, 388, 390. In *Whitehead v. Anderson*, *supra*, the court says: "A case of constructive possession is where the carrier enters expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody, on his account, and subject to some new or further order to be given to him;" and JAMES, L.J., shortly puts it in *Ex parte Cooper*, *supra*, that "there must be such change as makes the carrier or warehouseman the holder of the goods as the agent of the vendee." In *Hoover v. Tibbits*, 13 Wis. 79, this court held that when the warehouseman to whom the goods are directed to be sent receives them as the agent of the carrier, and while he is holding them as such agent for the purpose of collecting freight and charges the vendor asserts his right of stoppage of the goods, they will not be considered as in the possession of the vendee, so as to cut off that right; and in *Paper Co. v. Allen*, 65 Wis. 584, the rule laid down in *Benj. Sales* (2d Ed.), § 788, is declared to be the rule in this state,—that "if the possessor of the goods has the intention to hold them for the buyer, and not as agent to forward, and the buyer intends the possessor so to hold them for him, the *transitus* is at an end; but I apprehend that both these intents must concur, and neither can the carrier of his own will convert himself into a warehouseman, so as to terminate the *transitus*, without the agreeing mind of the buyer; nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatever to retain possession as against the buyer." In *Sherman v. Rugee*, 55 Wis. 346, 347, the question is broadly put whether there was ever a moment in which the purchasers had dominion and control over the property. Delivery, actual or constructive, by the carrier to the consignee or his agent, is a part of its duty as such, and, until performed, it cannot be said that the carrier has ceased to hold the goods as carrier. The real question is whether, under the evidence, it is a just inference that the carrier has intended to waive his lien for freight, and to surrender dominion and control over the property, or to hold

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it subordinate to and for the consignee. Unless the evidence justifies such a conclusion, the fair implication of the law is that, if the goods are in the carrier's warehouse, awaiting payment of freight and other charges, then the *transitus* has not been ended, but that the carrier holds them in his capacity of carrier, to keep good his common-law lien for freight and charges, and that they are subject to the vendor's right of stoppage. *Calahan v. Babcock*, 21 Ohio St. 281; *Symns v. Schotten*, 35 Kan. 310.

The evidence fails to establish an agreement or contract which would constructively render the possession of the defendant of the lumber in its warehouse the possession of the consignee. Simons, the freight agent, had no personal knowledge of the transaction. It occurred before his connection with the defendant company. He does not claim to know of any such arrangement between the defendant and the consignee. He testified only to the existence of a custom of the defendant, as he gathered it "from its records and papers in his charge" when he gave his testimony; and he said that such custom had existed with all railroads terminating in Boston for years, but that was merely a custom on the part of consignees of lumber to leave it in the sheds of the carrier, at their expense and risk, "to be taken away by them at any time, upon payment of freight and charges," and was no more than an understanding or custom on the part of the carrier to deliver on the usual terms, and according to the contract with him as carrier. It did not give the consignee any new rights, and did not give him dominion or control over the property. Cooper's testimony is equally inadequate to the purpose intended, and was, in substance, the same. He defined the right of the J. B. Dixon Lumber Company after the lumber had been stored in the shed of the carrier in the same way as "a right to remove it whenever it was convenient to do so, subject to the payment of the charges of the railroad company,"—the same right upon which any consignee may obtain his goods of a carrier. Speaking of the fact that after the lumber was stored in the shed part of it was delivered to him for the J. B. Dixon Lumber Company, he said, "Some person connected with the freight department authorized me to take it." The language of Lord BLACKBURN in *Kemp v. Falk*, 7 App. Cas. 584, is quite pertinent: "The freight was not paid, but I think it is possible to make an

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arrangement by which, though the freight is not paid, the shipowner changes himself completely into a warehouseman, instead of being a carrier or shipowner. He alters his responsibilities altogether, and yet, by arrangement or agreement, retains a lien over the goods until the freight is paid. I think such a contract might be made. But when one is asked to say that such a contract was made, the nonpayment of the freight is a very important element leading one to say that no such contract was made at all. In this case I cannot help thinking that no such contract was made, and there is no reason why we should hold that it was. The shipowner acted in the same way as if it had not been made, and in no other way." And the defendant so acted in the present case, as well as the consignee, as we have seen. The witnesses do not testify to any agreement or contract, or even understanding in the contractual sense, such as is relied upon to work a constructive delivery; and within the principles referred to, upon the evidence in the record, none can be deduced or implied.

3. The contention that a delivery of a part of the consignment operated as a constructive delivery of the remainder cannot be sustained. Whether delivery of a part amounted to a delivery of the remainder is a question of intention, and a delivery of a part will not be a delivery of the whole, unless the circumstances show that it was intended so to operate. It cannot be supposed that the carrier intended to abandon his lien for the unpaid freight and charges. *Benj. Sales*, § 857; *Ex parte Cooper*, 11 Ch. Div. 68; *Buckley v. Furniss*, 17 Wend. 504; *Crawshay v. Eades*, 1 Barn. & C. 181. Much more clearly would this be so where, as in this case, it was understood that delivery could be had only on payment of unpaid freight and charges.

4. The order given March 9, 1891, by the J. B. Dixon Lumber Company to F. C. Bill upon the defendant to deliver the lumber in question to him "on payment of freight and charges," and left with the defendant, could only operate to give Bill whatever rights the J. B. Dixon Lumber Company had. There is nothing to show that the defendant ever assumed to hold the lumber as his agent, or that they ever recognized any right on his part to have the delivery of it, or that it ever agreed to deliver it to him upon any terms whatever. The evidence shows that the defendant afterwards

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regarded the J. B. Dixon Lumber Company as entitled to the delivery of the lumber upon the usual terms as before. There is nothing in the case to show that this order is entitled to any significance in the present controversy. The defendant has been fully protected in its rights by the judgment of the circuit court, and no error has intervened to its prejudice. The judgment of the circuit court is affirmed.

NOTES

Stoppage in Transitu.—See 23 Am. & Eng. Enc. of Law 683, 903; Rapalje & Mack's Digest, title "Stoppage in Transitu"; 6 Am. & R. Cas. 375; 21 Am. & Eng. R. Cas. 84; 22 Am. & Eng. R. Cas. 432; 32 Am. & Eng. R. Cas. 567, 703; 30 Am. & Eng. R. Cas. 126.

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ROGERS.

(*Supreme Court of Nebraska, May 20, 1896.*)

Testimony as to Value of Property Destroyed Admissible.—In an action against a railroad company for setting out fire upon its right of way, which spread to the lands of the plaintiff, and destroyed trees thereon, the plaintiff testified as to the value of the trees. On cross-examination he said that in estimating their value he considered what they were worth to him as ornamental trees, and as adding to the value of the land. *Held*, that a motion to strike out his testimony as to value was properly overruled.

Fires Set on One's Own Land.—Section 62 of the Criminal Code, making it a misdemeanor to set fire to woods and prairies, applies to fires set out on the lands of another, and not on one's own land.

Statement of Propositions of Law Not Applicable to Issues.—It is reversible error to state to the jury propositions of law not applicable to the issues or evidence, where such statements might have a prejudicial effect upon the losing party.

Measure of Damages.—In an action for negligently setting out fire destroying trees on the land of the plaintiff, the measure of damages is the damages suffered by such trees.

Ascertainment of Damages.—In ascertaining such damages the inquiry should not be alone as to the value of the trees before their injury, but should be as to the difference in value before and after the fire.

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ERROR to Adams county district court. *Reversed.*

M. A. Reed, M. A. Hartigan, and John Hartigan, for plaintiff in error.

A. H. Bowen, for defendant in error.

IRVINE, C.—Rogers sued the railroad company, charging that in September, 1891, it negligently omitted to keep its right of way free from combustible materials, and permitted large quantities of grass and weeds to accumulate upon its right of way near the premises of the plaintiff; and that the servants of the railroad company negligently set fire to the grass, weeds, and combustible materials accumulated on the right of way, and negligently permitted said fire to pass upon the lands of the plaintiff, whereby 204 forest trees, of the value of \$300, were burned and destroyed. The answer amounted to a general denial. There was a verdict and judgment for the plaintiff for \$200, which the railroad company seeks to reverse. It was established without contradiction that two employees of the railroad company were engaged in burning the grass and weeds from the right of way. The fire escaped from their control, and spread upon plaintiff's land, burning his trees. The plaintiff was asked to state to the jury what, in his opinion, would be a fair and reasonable value for the trees immediately before the fire. An objection to this question was overruled, and he answered "about a dollar apiece." On cross-examination he was asked to state the basis of this valuation, and he answered: "Because they were worth that to me as ornamental trees. Q. What are the elements that enter into the estimate that you have made? A. Adding to the value of the land and the farm." The defendant then moved to strike out all his testimony in regard to value because not based on proper considerations. It was held in *Railroad Co. v. Crum*, 30 Neb. 70, that in such a case the measure of damages is not the depreciation in the value of the land because of the destruction of the timber, but is the amount of damages suffered by the timber by reason of the fire. On the trial both sides proceeded upon the assumption that this rule of damages was correct. The only difference in the two cases is that in the *Crum Case* the trees seem to have been of natural growth, while in the case at bar they had been planted and cultivated. It is suggested in the briefs that this difference may, for some purposes, mark a

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distinction in the rule, but we cannot perceive it. The contention of the defendant in regard to the evidence referred to is that the answers of the witness on cross-examination showed that his estimate of the value was not within the rule in the *Crum Case*. It was, however, said in the *Crum Case*, that the inquiry should be as to the value of the trees as standing timber, and not the market price for transplantation as shade or ornamental trees. The reason given in the opinion was that the latter valuation would require an inquiry into the cost of transplanting and transporting, and would depend upon the existence of a sufficient market for such trees. If the market value is not a proper test, and if their value must be determined as standing timber, then it follows that it is not only proper, but absolutely necessary, to consider their value with reference to the land in the situation in which they stood; and, so viewed, the witness' testimony was material and competent, and the court properly refused to strike it out. If we should hold that the value must be estimated without regard to the market value for the purposes of transplanting, as the *Crum Case* holds, and also without regard to the value of the trees as they stood with reference to the farm and as affecting its value, we would practically hold that no value could be established, and we should certainly be attempting to create distinctions imperceptible without the use of some instrument of high magnifying power. In the case of *Bailey v. Railroad Co.* (S. Dak.), 54 N. W. Rep. 596, the supreme court of South Dakota follows the rule of damages laid down in the *Crum Case*, and in the course of the opinion holds that evidence of a character similar to that here complained of is irrelevant, but the question was not presented by the record in such a manner as to permit a reversal, and *BENNETT, P.J.*, dissented upon this point in a forcible, and, to my mind, a most convincing, opinion. The court, at the request of the plaintiff, gave the two following instructions: " (1) Section 62 of the Criminal Code of the state of Nebraska, at page 880 of the Compiled Statutes of 1887, makes it a misdemeanor to set fire to any woods, prairies, or other grounds whatsoever in this state. This statute reads as follows: ' Sec. 62. (Setting Fire to Woods and Prairies.) If any person or persons shall willfully and intentionally, or negligently and carelessly set on fire, or cause to be set on fire, any woods, prairies, or other grounds whatsoever, in any part of

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this state, it shall be deemed a misdemeanor, and every person so offending shall be punished by a fine of not less than five (5) dollars nor more than one hundred (100) dollars, and by imprisonment in the county jail for not less than one month nor more than six months; provided, that this section shall not extend to any person who shall set on fire, or cause to be set on fire, any woods or prairies adjoining his or her own farm, plantation, field or enclosure, for the necessary preservation thereof from accident by fire between the first day of March and the last day of November, by giving to his or her neighbors two days' notice of such intention; provided, also, that this section shall not be construed to take away any civil remedy which any person may be entitled to for any injury which may be done or received in consequence thereof.' You are further instructed that every one has a right to presume that no one will be guilty of a misdemeanor, and is, therefore, under no obligation to anticipate such negligence to guard against it. Therefore, if you find that the defendant, or its agent or employees, negligently or carelessly set fire to the material upon its right of way, and that such fire destroyed plaintiff's property, the defendant will be liable for the damage. (2) If you find from the evidence that the destruction of the plaintiff's trees was the result of fires set out by the agents or employees of defendant, then you will find for the plaintiff, and assess his damage at such sum as may be warranted by the evidence.'" Modified by the court: "Provided you find that said fire was set out negligently and carelessly." The court should not have given the first instruction. The section referred to does not make it a misdemeanor for a man to set out fire upon his own land. To hold that it does so would require an interpretation of the proviso which would give him the privilege of setting out fire upon woods or prairies adjoining his land within certain seasons, and upon giving notice thereof to neighbors, where he would not have any such right upon his own land. Therefore the section had no application to this case. *Powers v. Craig*, 22 Neb. 621, was a case where fire had been set out on lands of another. Even if the section did apply to such a case as this, its violation would only be evidence of negligence, and would not create a liability as a matter of law. *Railroad Co. v. Metcalf*, 44 Neb. 848; *Railroad Co. v. Talbot*, 48 Neb. —, 67 N. W. Rep. 599. The instruction was ostensibly given

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for the purpose of avoiding any inference as to contributory negligence. But contributory negligence was not pleaded, and it is not contended that any existed. If the court saw fit to cover this subject, it might very properly have done so by a peremptory instruction that the question of contributory negligence was not involved. But the recital of this statute was inapplicable to the case, and without further explanation was necessarily prejudicial to the defendant. The second instruction was free from error after it had been modified by the court. The objection made to it is that it directed damages to be assessed at such sum as "may be warranted by the evidence." The sixth instruction given at defendant's request defined the measure of damages, it is true, not directly, but by such strong implication that it cured any error which may have existed independently thereof in the second instruction given at plaintiff's request.

The remaining assignments go, in effect, to the sufficiency of the evidence. We think the evidence was insufficient on the question of damages. If the damage to the trees, and not the injury to the freehold, is the proper measure, then it follows that the damages should be ascertained by deducting from the value of the trees before the fire their value thereafter. In *Railroad Co. v. Crum*, *supra*, there was evidence from which the latter value could be ascertained. It is contended that the evidence in this case shows that the trees, after the fire, were of no value. But we cannot view the evidence in this light. It appears that the trees were killed, and that they were afterwards removed. The plaintiff took two wagon loads home for use as firewood, and gave the remainder to a neighbor as compensation for his assistance in removing them. The argument, in effect, is that the trees were without value, because the plaintiff received no money therefor. But this is a *non sequitur*. The firewood he obtained was presumably of some value, as was also the timber which he gave to his neighbor. The evidence affords no basis for permitting a *remittitur*, even if the error in giving the first instruction did not require a reversal. Reversed and remanded.

Davis v. Chicago, M. & St. P. R. Co.

DAVIS

v.

CHICAGO, M. & ST. P. R. CO.

(Supreme Court of Wisconsin, June 19, 1896.)

Care to be Exercised by Carrier.—Extraordinary care must be taken by a carrier for the safety of its passengers.

Proximate Cause.—The negligence of a carrier cannot be considered the proximate cause of the injuries caused to a passenger by the derailment of a train so as to warrant a recovery, unless the accident might have been reasonably foreseen by a competent and experienced man, accustomed to the structure, inspection, repair, and management of the roadbed and track of a railway, while in the exercise of extraordinary care and prudence.

Burton Hanson and Geo. W. Bird, for appellant.
P. H. Fay and J. B. Smith, for respondent.

PINNEY, J.—The counsel for the plaintiff are in error in supposing that the court has held, or intended to hold, that the defendant company, as a carrier of passengers, was not bound to exercise extraordinary care for their safety, but ordinary care only. The opinion refers to the very high degree of vigilance and care the defendant company owed to the public in the structure, inspection, repair, and management of its track, and that the defendant's negligence could not be considered the proximate cause of the plaintiff's injury, so as to warrant a recovery, unless, under all the circumstances, the accident in question might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is pointed out that the language of the opinion on the subject of proximate cause, as to whether the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence, although a correct expression of the law in actions for injuries to property, or where the servant sues his master for damages caused by the negligence of the latter, and the measure of the defendant's duty is ordinary care, is inaccurate, as applied to the present case, where a passenger sues a railway company for injuries received while being carried on its road, and where

Care required
of carrier.

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the defendant is bound to the exercise of extraordinary care for his safety. It must be conceded that the criticism as to the use of the expression "ordinary intelligence and prudence," which was inadvertently used, is well founded. It should have been stated instead that the defendant's negligence could not, in the present case, be considered the proximate cause of the plaintiff's injury, so as ^{Proximate cause.} to warrant a recovery, unless, under all the circumstances, the accident in question might have been reasonably foreseen by a competent and experienced man accustomed to the structure, inspection, repair, and management of the road-bed and track of a railway, while in the exercise of extraordinary care and prudence. The opinion is to be considered as modified accordingly. There was no proper instruction, or finding by the jury, upon the question of the proximate cause of the plaintiff's injury; and the erroneous expression does not furnish, nor do we perceive, any sufficient ground for a rehearing. The motion for a rehearing is denied.

ST. LOUIS, K. & S. R. CO. *et al.*

v.

WEAR *et al.*

(*Supreme Court of Missouri, June 30, 1896.*)

Receiver under Unauthorized Order—Compensation.—If the order of appointment of a receiver has been adjudged to be unauthorized, he cannot claim compensation for his services out of the fund or property received by him under such order; his claim for allowances, etc., must be otherwise made in an accounting with the court in the suit wherein he was appointed.

Improper Party Defendant—Waiver of Objection.—In prohibition proceedings, an objection by a person that he is an improper party defendant will be considered as waived if not interposed until after judgment.

IN banc. On receiver's motion for allowance. *Denied.*

M. R. Smith, for plaintiffs.

W. S. C. Walker and *Boyle, Priest & Lahman*, for defendants.

PER CURIAM.—In the receiver's return to the peremptory writ, it is stated that he has delivered to the plaintiff company all the property in his hands as receiver, except about \$1,455, which he holds subject to the order of the court; and he asks whether he may be allowed therefrom his costs, and a

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reasonable attorney's fee, for the reason that he has no personal interest in the controversy, was only an appointee of the circuit court, and was not, as he is advised, a necessary party to this action.

1. A receiver's right to compensation and allowances for expenses does not depend upon the correctness of the order of appointment, where the appointment has been made by a court having general jurisdiction to take such action. But if the appointment is merely in excess of the power of the court, because the facts and circumstances do not authorize the appointment as made, and the enforcement of the order is therefore subjected to the check of a writ of prohibition, the receiver is not entitled to retain possession of any part of the property coming to his hands by virtue of the order. The order of appointment having been adjudged to be unauthorized, he cannot claim compensation for his services out of the fund or property received by him under the order. His claim for allowances, etc., must be otherwise made, in an accounting with the court in the suit wherein he was appointed. The prohibition in this case does not interfere with the general course of Mr. Kerfoot's suit in Dunklin county. It forbids action upon the original orders for the receivership, and annuls what was done under those orders; but it leaves the action pending as before. The receiver's application for allowances, etc., cannot properly be granted in this court in this case as it now stands, but must be left to the circuit court for consideration, as above indicated. Meanwhile, the receiver, in pursuance of the final judgment in prohibition, should forthwith deliver to the plaintiff company any and all funds and property remaining in his hands as receiver, and make return of full compliance with the judgment within five days after service of this order.

2. Whether the receiver was a necessary party to the present action we need not inquire, at this stage of it. Proceedings in prohibition are governed by the Code of Civil Practice, except as otherwise provided in the act regulating that writ. Laws 1895, p. 95, § 3. Hence any such objection as is now suggested should have been interposed much earlier to be available. It must now be considered waived. Rev. St. 1889, §§ 2043, 2047; Soeding v. Bartlett, 35 Mo. 90.

All concur, except SHERWOOD, J., dissenting.

Receiver under
unauthorized
order.

Improper
party defend-
ant—Waiver
of objection.

Selvege v. St. Louis & S. F. R. Co.

SELVEGE

v.

ST. LOUIS & S. F. R. CO.

(*Supreme Court of Missouri, Div. No. 2, June 30, 1896.*)

Interference with Interstate Commerce.—A state statute prohibiting the transfer through the state of cattle infected with any infectious disease is an attempt to regulate commerce between the states, and therefore in opposition to the constitution of the United States, and void.

APPEAL from Laclede county circuit court. *Reversed.*

GANTT, P. J.—This action was commenced before a justice of the peace upon the following statement: “Plaintiff, John Selvege, for his cause of action, states that the St. Louis and San Francisco Railroad Company, at the time hereinafter mentioned, was a corporation duly organized under the laws of the state of Missouri. Plaintiff further states that the said railroad company did, between the 1st day of April, 1892, and the 1st day of June, 1892, bring into, upon, and through Laclede county, Missouri, and from one part of said county to another part of said county, on its railroad, Texas, Mexican, Cherokee, or Indian cattle affected with what is commonly called Texas or Spanish fever, and with other contagious and infectious diseases. Plaintiff further states that said Texas or Spanish fever and other contagious disease was communicated from said diseased cattle to animals in the neighborhood and along the line of such transportation, and that on or about the 18th day of September, 1892, plaintiff was the owner of three cows, of the value of one hundred and five dollars; that said Texas, Mexican, Cherokee, or Indian cattle so transported by defendant company on its cars was and said cattle went at large in the neighborhood and along the line of said railroad of said defendant; and that Spanish or Texas fever and other infectious and contagious fever or disease was communicated from such diseased animals to the said three cows of plaintiff, by reason of which said cows of plaintiff became diseased and died, by which plaintiff was

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damaged in the sum of one hundred and five dollars, for which plaintiff prays judgment, with costs of suit."

Judgment was rendered in plaintiff's favor by the justice, and in due time the case was appealed to the circuit court, where it was tried before the judge thereof sitting as a jury, upon the following agreed statement: "It is hereby stipulated and agreed that the court shall consider the following facts in said cause, to wit: That in the month of September, 1892, after the wreck at Brush Creek hereinafter stated, the animals described in plaintiff's petition, died of disease, and upon a post mortem examination their appearance indicated that they died of Texas or Spanish fever; and the value of said cows was \$105 at the time of their death. That their symptoms prior to death, and their appearance after death were those of an animal affected by Spanish or Texas fever; and that their usual range was in Clough's addition to the town of Lebanon, and particularly around and near the stock yards in said town. That several other animals which usually grazed in the same range died at about the same time, and had symptoms similar to plaintiff's cows before death, and similar appearances afterwards. That on the 22d day of June, 1892, there was a wreck on defendant's railroad near Brush Creek, in Laclede county, Mo., about seven miles west of Lebanon, by which several cars of a freight train were derailed; and that in that wreck one car loaded with cattle was broken up, and the cattle therein escaped to the adjacent county; and that no cattle escaped from any other car in said train. That said car was badly broken up, the end of it being broken out, and the running part thereof being in such a condition that it was impossible to run the same further on said road; and that the same remained upon the roadbed and track of the defendant until after the cattle were removed therefrom, as hereinafter stated; and that, by reason of said car and running gear being upon the roadbed, no other train could pass there until said car was removed; and that the cattle from said wrecked car, after the wreck, were turned out of said car by defendants' employees opening the car, and turning them out upon the right of way. That said car was marked in plain letters on the side thereof 'Southern Cattle'; and that the said cattle that so escaped had the appearance of Texas cattle, but appeared to be healthy cattle. Said cattle were collected by the employees and agents of defendant from off the range the

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next day afterwards, and were driven up the public road to the town of Lebanon, through Clough's addition to said town, and were there placed in the stock yards about dark the next night after the wreck, and during the night were shipped away. The stock yards in which these cattle were placed were the same stock yards as those near and around which plaintiff's animals were in the habit of grazing. That there were no deaths among native cattle at and around Lebanon, in Laclede county, Mo., with symptoms of Texas fever, till after the wreck at Brush Creek; and that after that time a large number of native cattle in the ranges through which the Texas cattle from the wreck were driven died with symptoms of Texas fever, and no native cattle died with such symptoms except such as grazed in the ranges through which the Texas cattle passed. That after the said wreck near Brush Creek, in Laclede county, Mo., the native cattle in Laclede county, Mo., along the line and right of way of the St. Louis & San Francisco Railroad, over which the said Texas cattle were being transported, died, with all the characteristic symptoms and lesions peculiar to the Texas or Spanish fever; and that there were no native cattle died of such disease except such as passed through such ranges where the Texas cattle had been. That all the native cattle that died of Texas fever were usually kept on the range, and in the immediate vicinity of defendant's right of way in Laclede county, Mo. That said Texas cattle, while being so driven to stock yards at Lebanon, stampeded, and ran around and about the neighborhood in which plaintiff's cow was grazing, and on which she grazed until she became sick, as above stated. That it is a scientific fact that cattle from a district infected with Texas fever, though perfectly healthy themselves, can, and sometimes do, disseminate the disease known as Spanish or Texas fever among native cattle, and that the disease can be communicated by such healthy cattle from an infected district in different ways, and one of the ways is by native cattle passing along or across the range through which infected Texas cattle have passed. That the defendant operates a line of railway running from Paris, Tex., through the Indian Territory and Arkansas, and also a line from Sapulpa, in the Indian Territory, by way of Vinita, in the Indian Territory, through Missouri, to the city of St. Louis; and that said road connects with the Missouri, Kansas & Texas Railroad at Vinita; and

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that said lines of road meet at Monett, Mo., and cars from all of said lines pass over the main line of road from Monett to the city of St. Louis; and that said main line passes through Laclede county, Mo.; and that Brush Creek and Lebanon are both stations on said line between Monett and St. Louis. That the only car broken open in said wreck which took place near Brush Creek, Laclede county, Mo., on June 22, 1892, was stock car initialed 'C. C. C. C.' and numbered 2,287. That said car contained twenty-three (23) head of beef cattle, shipped by Samuel Hunnicut, from Greenville, in the state of Texas, which were consigned by Samuel Hunnicut, from Greenville, Tex., direct to Cassidy Brothers, National Stock Yards, East St. Louis, Ill. That they were shipped on a through bill of lading from Greenville, Tex., over the Missouri, Kansas & Texas Railway, to Vinita, Indian Territory, and from Vinita to St. Louis, Mo., over the St. Louis & San Francisco Railway, and from St. Louis, Mo., to East St. Louis, Ill., over the Bridge Terminal Company. That said cattle were unloaded and fed at Vinita, and from that point were destined direct to East St. Louis, without any intention of unloading in Missouri; and that except for the accident resulting in the wreck of June 22, 1892, the same would have passed directly through the state of Missouri, without unloading, and without any delay, except such as is necessarily incident to such traffic and the transfer to and over the terminal lines; and that the cattle so shipped by the said Samuel Hunnicut, from Greenville, Tex., to Cassidy Brothers, East St. Louis, Ill., were the same cattle that escaped from the car near Brush Creek, Laclede county, Mo., on June 22, 1892, to the adjacent county, and which were gathered and put in the stock yards at Lebanon, Mo., by the employees and agents of the defendant, as above stated. That over the face of the said bill of lading was written 'Southern Cattle,' and also the word 'Quarantine'; and, if the finding shall be for plaintiff, judgment shall be entered in his favor for the sum of \$105 and costs. That it is further agreed that germs of Texas or Spanish fever are scattered or set out in ranges of native cattle by Texas or Spanish cattle passing through the ranges of native cattle, and that such germs will continue to live, and may be communicated to and thereby affect native cattle with Texas or Spanish fever at any subsequent time,

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until such germs are killed by freezing during the following winter."

The defendant then prayed the court to give the following instructions: "The court declares the law in this case as follows: First. Under the stipulations of the facts in this case the plaintiff is not entitled to recover, and the finding shall be for the defendant. Second. That the provisions of section 953 of the Revised Statutes of Missouri, for the year 1889, in so far as they apply to interstate commerce, are unconstitutional and void, and are in conflict with section 8, article 1, of the constitution of the United States. Third. That the provisions of section 954 of the Revised Statutes of Missouri for the year 1889, in so far as such provisions apply to interstate commerce, are unconstitutional and void, and are in conflict with section 8, article 1, of the constitution of the United States,"—which the court refused to do, to which refusal of the court to give such instructions defendant then and there excepted at the time. The court found for the plaintiff, and rendered judgment accordingly.

It is apparent on the face of the petition that plaintiff's right to recover is bottomed upon sections 953 and 954, Rev. St. Mo. 1889.* It also appears beyond all cavil that the cattle were shipped from Texas to Illinois, and, at the time of the accident to the car in which they were loaded, were being transported through this state, without any intention of being unloaded within our borders. Cattle thus transported are articles of interstate commerce, and such a shipment falls clearly within the authority of congress to regulate commerce between the states. In the recent case of *Grimes v. Eddy*, 126 Mo. 168, said sections 953 and 954 were condemned by this court *in banc*, as an attempt to regulate commerce between the states, and therefore in contravention of the constitution of the United States, and void. As no allegations of negligence is made in the statement, and the agreed statement discloses none, there appears to be no foundation whatever for a recovery. The judgment of the circuit court is reversed.

SHERWOOD and BURGESS, JJ., concur.

* Rev. St. 1889, §§ 953, 954, prohibit the transportation through the state of any Texas, Mexican, Cherokee, or Indian cattle afflicted with Texas or Spanish fever.

NOTES

Transportation of Diseased Live Stock—Constitutionality of Statutes.— A statute of a state which prohibits driving or conveying any Texas, Mexican, or Indian cattle into the state between the first day of March and the first day of November in each year is in conflict with the clause of the constitution which ordains: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465, 15 Am. Ry. Rep. 325. Approved in *Gilmore v. Hannibal, etc., R. Co.*, 67 Mo. 323. Followed in *Adams Express Co. v. Board of Police*, 65 How. Pr. (N. Y. Super. Ct.) 72; *Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613. Quoted in *State v. Baltimore, etc., R. Co.*, 24 W. Va. 783, 18 Am. & Eng. R. Cas. 466; *Hardy v. Atchison, etc., R. Co.*, 32 Kan. 698, 18 Am. & Eng. R. Cas. 432; *Fry v. State*, 63 Ind. 552; *Com. v. Wilson*, 14 Phila. (Pa.) 384; *Norfolk, etc., R. Co. v. Com.*, 88 Va. 95. Reviewed in *Bagg v. Wilmington, etc., R. Co.*, 109 N. Car. 279.

The act in relation to Texas and Cherokee cattle (Illinois Rev. Stat. 1874, p. 141) is void, as being repugnant to the constitution of the United States, art. 1, sec. 8, which provides that "congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613. Following *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465. Overruling *Yeazel v. Alexander*, 58 Ill. 254; *Stevens v. Brown*, 58 Ill. 289; *Somerville v. Marks*, 58 Ill. 371; *Chicago, etc., R. Co. v. Gasaway*, 71 Ill. 570.

The Missouri statute (Wagn. Mo. St. p. 251, sec. 1), known as the Texas cattle act, prohibiting the introduction of Texas, Mexican, or Indian cattle into the state between March 1 and November 1, unless they had been kept the entire previous winter in the state, is in conflict with that provision of the constitution of the United States conferring upon congress the power to regulate commerce among the states. *Gilmore v. Hannibal, etc., R. Co.*, 67 Mo. 323. Following *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465. Overruling *Wilson v. Kansas City, etc., R. Co.*, 60 Mo. 184; *Dimond v. Kansas City, etc., R. Co.*, 60 Mo. 393; *Mercer v. Kansas City, etc., R. Co.*, 60 Mo. 397; *Kenney v. Hannibal, etc., R. Co.*, 62 Mo. 476.

Illinois.—A railroad is not bound, as a common carrier, to receive for transportation that which the law prohibits it from carrying, and it is liable for any injury occasioned by its bringing Texas or Cherokee cattle into this state, the same as an individual is. *Chicago, etc., R. Co. v. Gasaway*, 71 Ill. 570.

An unconstitutional law, prohibiting railways from carrying Texas or Cherokee cattle into or through the state, being void, will afford no excuse for a refusal or delay in receiving and shipping such cattle when offered. *Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613.

In an action for bringing Texas and Cherokee cattle into this state by one who purchased the same to recover for a fatal disease communicated to his native cattle, the declaration will be fatally defective if it fails to aver that the cattle were not brought into the state between October 1 and the 1st of the following March, as without this his purchase and ownership is illegal, and, being a violation of the law, he can maintain no action for an injury growing out of his wrongful act. *Frye v. Chicago, etc., R. Co.*, 73 Ill. 399.

Iowa.—The Iowa St. (ch. 126, Acts 21st Gen. Assem.) prohibiting any person or corporation from bringing into the state cattle in such condition as to infect other cattle with pleuropneumonia or Texas fever, and giving any person damaged by violation of the act a right of action to recover the damage suffered from the person or corporation violating the statute, does not impose upon a railroad company an absolute liability to pay all damages arising by reason of the carrying of infected animals into the state. Such a statute only makes the fact of an injury so occurring *prima facie* evidence of negligence, which may be rebutted by the railroad company showing that it had no notice, and could not, by the use of reasonable care, have ascertained, that the animal was diseased. *Furley v. Chicago, etc., R. Co.*, 90 Iowa 146, 57 Am. & Eng. R. Cas. 26.

Kansas.—Under the Kansas Act of 1881, ch. 161, as amended in 1883, ch. 145, and 1884, ch. 3, for the protection of cattle against contagious diseases, a railroad company is not liable for transporting cattle into the state where it acts in good faith and without knowledge, or upon such facts as to charge it with knowledge, that the cattle are of a kind liable to communicate disease to the domestic cattle of the state. *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550.

Where a railroad company, transporting through Kansas cattle diseased with the Texas splenic or Spanish fever, has its train wrecked within the state, so as to make it necessary to unload the cattle, and thereupon is notified that the cattle are from Texas, and will spread disease if permitted to run at large or driven on the highway, it should corral the cattle at or near the wreck, or otherwise prevent them from running at large or getting upon the public highway; and if it drives the cattle upon the highways or allows them to run at large after receiving such notice, it is liable for diseases communicated, unless the owners of the domestic cattle are guilty of contributory negligence. *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550.

Missouri.—Under Wagn. Mo. St. p. 251, sec. 1, prohibiting the importation of Texas, Mexican, or Indian cattle between March 1 and November 1, unless they had been kept in the state the previous winter, it makes no difference where the cattle started from, whether in or out of the state. If the cattle have not been kept in the state for an entire previous winter, the driving or conveying of them into another county of the state is prohibited, and the statute makes the

person wrongfully bringing in such cattle liable for all damages, direct or remote, due to his wrongful act; and this will apply to diseases communicated while they are in his control or caused by want of proper care, without regard to the question of negligence. *Wilson v. Kansas City, etc., R. Co.*, 60 Mo. 184. Followed in *Husen v. Hannibal, etc., R. Co.*, 60 Mo. 226; *Dimond v. Kansas City, etc., R. Co.*, 60 Mo. 393; *Mercer v. Kansas City, etc., R. Co.*, 60 Mo. 397; *Kenney v. Hannibal, etc., R. Co.*, 62 Mo. 476.

The liability of railroad companies for violating Missouri Rev. St. sec. 4358, prohibiting the bringing or moving through the state, or from one part of the state to another, of diseased cattle, is not an unqualified one; but the liability is limited to the diseases communicated to any other animal or cattle in the neighborhood or along the line of such transportation or removal. *Coyle v. Chicago, etc., R. Co.*, 27 Mo. App. 584.

The meaning of the "line" of the railroad, as used in this statute, is its right of way, usually one hundred feet in width; and the expression "along the line" of the road means in a line with it—by the side of it, near to it. The meaning of the term "neighborhood" is a place near—vicinity, adjoining district, etc. *Coyle v. Chicago, etc., R. Co.*, 27 Mo. App. 584.

If a railway furnishes cattle cars in order that ties should be loaded thereon, and these cars contain such an accumulation of refuse matter, resulting from the carriage of cattle, that the loading of the ties on them necessarily involves the ejection of some of this refuse matter, such ejection constitutes an unloading of the matter by the railway company within the purview of the statutory inhibition (Mo. Rev. St. sec. 2669), though the ties are loaded on the cars by the servants of an independent contractor. *Pike v. Eddy*, 53 Mo. App. 505.

The fact that the loading of the ties by these servants reasonably and properly involved the ejection of this matter is not sufficient to render the ejection an unloading of the matter by the railway company, so as to subject it to liability under the statute. *Pike v. Eddy*, 53 Mo. App. 505.

Though a company may have violated the statute by bringing in Texas cattle, it is not liable for the spread of disease after it has parted with them and they have been driven by the owner into another county, as each transportation is an independent offense. *Surface v. Hannibal, etc., R. Co.*, 60 Mo. 216; *Surface v. Hannibal, etc., R. Co.*, 63 Mo. 452. Following *Wilson v. Kansas City, etc., R. Co.*, 60 Mo. 195.

Texas.—A shipper of cattle is not required to have his entire herd inspected, as required by the Texas statute, before delivery to a carrier for shipment; neither would the agent of the carrier violate the statute by receiving the entire herd for shipment before full compliance with the law. So, where part of the cattle have been inspected, the loading may begin while the remainder are being in-

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spected, so as not to cause a delay. *International, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 198.

Plaintiff applied for cars, which were furnished, and pointed out to him, but before his cattle were all inspected, as required by statute, other cattle were offered for shipment and were placed in the cars, causing a delay in the shipment of plaintiff's. At the time the second herd were offered the inspection of plaintiff's cattle had so far progressed that the loading might have commenced at once without any delay. *Held*, that the company was liable for the delay caused by giving the other herd the preference. *International, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 198.

CHESAPEAKE & OHIO R. CO.

v.

MOSBY.

(*Supreme Court of Appeals of Virginia, April 16, 1896.*)

Release of Claim for Damages.—The validity of a release of the claim for damages, signed by an employee, injured in the service of a railroad company, who had the capacity to sign such release, and was not induced to do so by fraud or undue influence, will not be impeached merely because it was unwise on the part of such employee.

Validity of Stipulation of Employment in Release of Claim for Damages.—A contract between an employee injured in the service of a railroad company and the railroad, in which the employee released all claim for damages for his injuries, in return for which he was to receive a certain sum for six months, at the end of which time he was to resume his former position if able, and if not able he was to receive a less laborious position, is not invalid by reason of uncertainty.

APPEAL from Richmond chancery court. *Reversed.*

F. W. Christian, W. J. Robertson, H. T. Wickham, and Henry Taylor, Jr., for appellant.

Robert Stiles and Wm. Ellyson, for appellee.

HARRISON, J.—Pending his action for damages, the plaintiff, who was conductor of a freight train on the Chesapeake & Ohio Railway, and while thus engaged was seriously injured in a collision, has instituted this suit in chancery to set aside a release of all claim for damages suffered by him in that accident, on the ground that at the

Case stated.

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time of executing said release he was mentally incompetent, and that the defendant company took advantage of his incapacity to procure the release. The case was heard by the chancellor without the intervention of a jury, upon depositions only; and the petition for appeal contains no other assignment of error but that the chancery court erred in coming to the conclusion, upon the evidence, that the plaintiff was entitled to the relief asked in his bill.

“ The law presumes that there is in every one capacity to contract, and accordingly, where exemption from liability to fulfil an engagement is claimed by reason of the want of such capacity, this fact must be strictly established on the part of him who claims the exemption. Moreover, it is only in certain prescribed cases that this protection can be claimed; and therefore weakness of mind short of insanity, or immaturity of reason in one who has attained full age, or the mere absence of experience or skill upon the subject of the particular contract, affords *per se* no ground for relief at law or in equity.” 1 Chit. Cont. 186. The same author from whom this general rule has been quoted states its qualification thus: “ Although weakness of intellect, short of insanity, in one of the contracting parties, is no ground *per se* for invalidating a contract, it may have that effect if additional facts, betraying an intention to overreach, can be proved.” 2 Chit. Cont. p. 1050.

This rule, with its qualification, is substantially adopted by this court in *Greer v. Greers*, 9 Gratt. 330. It was there said that, although the person may labor under no legal incapacity to do a valid act or make a contract, yet, if the whole transaction, taken together with all the facts,—mental weakness being one of them,—showed that consent, the very essence of the act, was wanting, it would be void. Where a legal capacity is shown to exist, that the party had sufficient understanding to clearly comprehend, that he consented freely to the special matter about which he was engaged, and no fraud or undue influence is shown to have been used to bring about the result, the validity of the act cannot be impeached, however unreasonable or imprudent it may seem to others. It is not the propriety or impropriety of the act, but the capacity to do the act freely, that must control the judgment of the court.

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These general principles are entirely applicable, and are all that need be invoked in considering the case before us.

The plaintiff was very seriously injured in a collision between two trains on the road of the defendant, he being conductor on one of the said trains. In addition to a broken arm, he had an injury to his head, and, as a result of the latter, the use of the other arm was for some time greatly impaired; besides being otherwise bruised about the body. He was confined to the house about one month, and continued to suffer more or less for about twelve months. It satisfactorily appears from the evidence that about two months after the accident the plaintiff went to the office of the superintendent of the defendant company, and agreed upon a settlement of his claim for damages against the company. This agreement was that the plaintiff should receive for six months \$75 per month, and if, after the expiration of that time, he did not feel able to resume his position as freight conductor, the defendant would furnish him less laborious labor until such time as he did feel able to resume his former position. About two months after this agreement was made, the plaintiff went to the office of the superintendent, and collected \$300 on account of this settlement, and gave a receipt therefor, which fully describes the accident, and admits that his injuries were received under circumstances exonerating the company from responsibility.

On the 22d of September, 1891, the plaintiff again went to the office of the superintendent, and collected the remaining \$150 due under the agreement, and gave a final voucher therefor, which is a more elaborate paper than the first, reciting that the injuries were received under circumstances completely exonerating the company from liability, and that the amount was received in full compromise, satisfaction, and discharge of all his claims or causes of action, and particularly of all claims or causes of action arising out of personal injuries received by him in the accident as to which the settlement had been made.

The plaintiff admits the genuineness of his signature to both these papers, but says that he has no recollection of signing any but the last one for \$150; and further insists that both papers should be declared null and void, because at the time of their execution he was mentally incompetent, and that the defendant took advantage of his incapacity to procure them.

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The evidence wholly fails to sustain this contention; on the contrary, it shows that the plaintiff had an intelligent comprehension of his rights in the premises. The first receipt was given four months and the other six months after the accident, when the plaintiff had been going about for months.

The plaintiff says that he suffered a long time with his head, and could not sleep well, and that he was neither physically nor mentally able to attend to business for twelve months after the accident. He does not deny the statements of the superintendent as to the transaction, but merely says that he does not remember the transactions detailed by that officer. He admits that he could read, and that he had every opportunity to read the voucher for \$150, which he remembers signing; says that he glanced at it, and saw there was something in it about accident; and further says that no one forced him to sign the voucher.

The father of the plaintiff and two other witnesses express the opinion that the plaintiff was not competent to attend to business, but they point to no sufficient facts or circumstances to sustain their opinion. The father says that he urged the plaintiff to have no dealing with the defendant until he had advised with counsel, and then to follow the advice of his counsel. It might fairly be presumed that if the plaintiff had sufficient mental capacity to discuss his case with counsel, and to follow his advice, he was not so bereft of reason as to render him incapable of understanding the proposition submitted to him by the defendant. On the other hand, the evidence of the defendant establishes beyond controversy that the plaintiff at the time of these transactions was laboring under no legal incapacity to contract, but was fully competent to make a valid and binding agreement.

Without commenting upon all the evidence, it is sufficient to refer to the testimony of Dr. Hugh M. Taylor, a physician of skill and high standing, employed by the defendant, and who had charge of the plaintiff's case from the time of the accident until he no longer needed his services. This witness says that during the time plaintiff was confined to his house he saw him every day; that after he got out he came to his office once or twice a week for a long time, and later on once a week; that he saw him frequently for eight or ten months. He expresses the emphatic and unqualified opinion that at no time was there any defect in the plaintiff's mental capacity,

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and at no time was there any difficulty in his comprehending such a business transaction as the settlement of a claim for damages on account of injuries received by him in this collision. He says that during his frequent interviews with the plaintiff the evidence of intelligence and correct cerebral action was too vividly impressed to make it probable that his opinion in regard to the matter could be changed by the testimony of others.

The opinion of this witness is entitled to the highest consideration. He is not only a skilled expert, but has had the fullest opportunity afforded by personal intercourse to form a correct judgment.

The plaintiff insists that the consideration for the settlement made by him was totally inadequate, and that this circumstance, taken in connection with the "glaring inequality" between the contracting parties in this case, superadded to "his shattered and enfeebled condition," is sufficient to justify the court in releasing him from the contract he has made.

If the plaintiff was, at the time he signed the release, competent to appreciate and understand its nature and effect,—and we have seen that he was,—and no unfair methods were used to induce him to sign it, then it makes no difference whether the settlement was, on his part, wise or unwise. So far as this transaction is disclosed by the record, it is absolutely free from the suspicion of fraud, advantage, or undue influence on the part of the defendant. The plaintiff was not sought by the defendant and urged to make a settlement; on the contrary, he voluntarily sought the defendant, months after the accident, when he had been going about, and conferring with friends, and discussing the propriety of bringing a suit. In his first interview no settlement was closed. In each interview with the defendant he claimed to have a good legal claim for damages, and the defendant uniformly denied all liability to him on account of the accident. In the last interview he again expressed the opinion that he had a good claim, and that his father had consulted a lawyer about his case. The superintendent then offered, if he would return the money already received, to surrender the first voucher, and he could bring suit. This he declined, saying he did not intend to bring suit; that he preferred to carry out the contract as already agreed upon.

There is nothing in the record upon which to base the con-

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tention that the consideration was inadequate. For aught that appears to the contrary, it may have been a wise contract for the plaintiff to make. There is no evidence showing that the company was under any liability to the plaintiff, and none can be inferred, for in a suit by an employee against a railroad company the mere proof of the accident raises no presumption of negligence against the company.

The plaintiff has no just ground to complain of the great inequality between himself and the defendant in point of wealth, power, and influence. There is no evidence that this superior power and influence of the defendant was exerted to the disadvantage of the plaintiff in any way. If the disparity here complained of was a sufficient ground for setting aside the contract between the parties, then a railroad company could never settle disputed claims with its employees,—a practice that should be encouraged, rather than discouraged.

The charge in the amended bill that the contract, if otherwise legal, should be set aside for uncertainty, and because it

Validity of stipulation for employment. has not been carried out by the defendant, is also without merit. The contract proven is clear and simple, and the evidence shows that it has been carried out in its letter and spirit. The money

consideration has been paid in full, and it further appears that the plaintiff, at his own request, was assigned to the position of baggage man on the train, the company removing another employee to make the place for him. This position the plaintiff did not keep but a few days, and gave it up, because the jar of the train hurt his head. He then declined the position of ticket agent, which was offered him by the defendant, and at his own request was appointed check clerk at a depot, another employee being removed to give him this place. He kept this position but a short time, and gave it up voluntarily, without assigning any reason therefor, and soon thereafter brought his suit for damages.

The law favors the compromise and settlement of disputed claims. It is to the interest of all that there should be an end of litigation; and a settlement deliberately sought, as this was by the plaintiff, ought not to be set aside except upon the most satisfactory evidence.

For the foregoing reasons the decree complained of must be reversed and set aside, and this court will enter such decree as the court below ought to have entered.

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WRAGGE

v.

SOUTH CAROLINA & G. R. CO.

(*Supreme Court of South Carolina, July 14, 1896.*)

Liability of Railroad Corporation—Proximate Cause.—Where a state statute provides that if the neglect of a railroad corporation in giving signals required by statute contributed to the injury of a person injured at a crossing the railroad company shall be liable, it was *held*, that the liability of the railroad corporation was not dependent upon the fact that the neglect to give the statutory signals was the proximate cause of the injury, but upon the fact that such failure contributed to the injury.

Failure to Make Unsought Explanation of a Term Not Error.—In such a case when no request was made for the judge to explain the meaning of the term “contributed” to the jury his omission to do so is not error.

Construction of Statute.—Where a state statute provides that if the neglect of a railroad corporation in giving the signals required by statute contributed to the injury of a person injured at a railroad crossing the corporation shall be liable, it is not error to refuse to instruct, in reference to the meaning of the term “contributed,” that the plaintiff, to recover, must prove, in addition to the failure to give these signals, that, but for such failure, the injury would not have occurred.

Reviewal of Request to Charge—Non-conformance with Rules of Court.—The refusal of a trial judge to give requests to charge will be considered by the supreme court, although they were not presented to the trial judge in the form prescribed by the rules of the court, when the objection to the requests was not raised in the trial court, and they were considered by that court.

APPEAL from Charleston county common pleas circuit court.

The charge of the trial judge was as follows:

“ This is an action brought by the plaintiff, Mrs. Caroline A. Wragge, as administratrix of the estate of Henry H. Wragge, deceased, against the South Carolina & Georgia Railroad Company, to recover the sum of \$30,000. It is my duty to construe the pleadings, and to inform you as to the issues before the court, and perhaps I can best explain them by saying to you in brief language that, some years back, an injury which resulted in the death of a person, or the cause of action resulting therefrom, died with the person. This state—I think it was in 1859—
adopted the English statute, which allowed the executor or

Charge of
court below.

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administrator of the person who was killed through the negligence of any person or corporation to bring an action for the benefit of the wife and children, based upon the killing of the husband. The act to which I refer says that such administrator may bring an action for the benefit of the heirs at law or distributees of the person whose death has been so caused as may be dependent on him for support. Mrs. Wragge, it is admitted here, is the administratrix of the estate of her late husband, Henry H. Wragge, who, it is admitted, is dead; and that his death was occasioned by a collision with a railroad engine and cars of the defendant company; so that the next inquiry to which I will invite your attention is as to the complaint.

“ The complaint alleges, after stating that Mrs. Wragge is the administratrix of her deceased husband, and, after setting out the names of his wife and children, and their ages, and that the action is brought for their benefit, goes on to say: ‘ That a public road and way leads from the Atlantic Phosphate Works over and across the track of the defendant to the Meeting street road, in the county and state aforesaid; that on the afternoon of the 14th day of February, Henry H. Wragge, the plaintiff’s intestate, was traveling in a vehicle drawn by one horse along the aforesaid road and way from the Atlantic Phosphate Works to the aforesaid Meeting street road, which said road and way crosses the railroad of the defendant at a certain place known as “ Atlantic Crossing,” and as the said Henry H. Wragge had reached said crossing the defendant carelessly, negligently, and recklessly caused one of its locomotives, with a train of cars attached thereto, to approach said crossing at a very high rate of speed, and then and there to pass rapidly over the track of the said railroad, and negligently, carelessly, and recklessly omitted, while so approaching said crossing, to give any signal by ringing a bell or sounding a steam whistle of said locomotive, as required by law, by reason whereof the aforesaid Henry H. Wragge was unaware of the approach of the said locomotive and train of cars attached thereto; that by reason of the aforesaid negligence of the defendant, and while the said Henry H. Wragge was lawfully upon and passing over said crossing, said locomotive struck the said Henry H. Wragge, whereby he was so seriously injured that he soon thereafter died; that the said Caroline A. Wragge, Daisy

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Estelle Wragge, James H. Wragge, and Thomas H. Wragge, for the benefit of whom this action is brought, are the widow and children of the deceased, respectively, and were entirely dependent upon him for their subsistence, and sustained by his death great pecuniary injury and damage, viz., \$30,000; wherefore the plaintiff prays judgment against the defendant for the sum of \$30,000, and for her costs and disbursements.' I charge you that under that complaint the cause of action set out there is for the alleged killing of Mr. Wragge at the place or way or road mentioned in the complaint.

“ Negligence is a mixed question of law and fact, and where one sues another for negligence it is incumbent upon the pleader to set out the facts upon which he bases his action; and in this connection it is necessary to refer to sections 1685 and 1692 of the Revised Statutes of 1893, as bearing directly upon this case. Section 1685 provides: ‘ That a bell of at least 30 pounds weight and a steam whistle shall be placed on each locomotive engine, and the bell shall be rung or the whistle sounded by the engineer or fireman at a distance of at least 500 yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street or traveled place, and if the engine or cars shall be at a stand still within a less distance than 100 rods of such crossing the bell shall be rung or the whistle sounded for at least 30 seconds before the engine shall be moved, and shall be kept ringing or sounding until the engine shall have crossed such a public highway or street or traveled place.’ Now, the next section (1692) says: ‘ If the person is injured in his person or property by collision with an engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this article, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, unless it is shown that in addition to the mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of law, and that such gross or wilful negligence or unlawful act contributed to the injury.’ Now, in passing, I would refer to a remark appearing in an opinion of the supreme court in the case of *Kaminitsky v. Railroad Co.*,

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25 S. Car. 64, which says: ' We do not, however, consider that by the aforesaid provision the main object of the legislature was to make a change in the law of evidence, but to induce compliance with the previous requirement as to signals. The rule of evidence as to negligence was made to apply only in case of failure to give the required signals, and it is manifest that the purpose was to give an additional sanction to the provision requiring the signals to be given.' Now, in connection with the law, I had better take up the requests to charge. The defendant has put in an answer denying the allegations of the complaint, and as a further defense alleges that an accident would not have happened but for the gross negligence of the plaintiff. The law requires me to pass upon these requests to charge, and, as they are very numerous, I shall pass upon them, and instruct you as to the general law.

" The first request of the plaintiff is as follows: ' By the statute law of this state a railroad company is required to have a bell of at least 30 pounds weight and a steam whistle placed on each locomotive engine, and such bell shall be rung or such whistle sounded by the engineer or fireman at the distance of at least 500 yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street or traveled place.' That is correct, and I so charge you.

" Now, the defendant's request, bearing upon the same subject, is defendant's first request: ' That this action is brought by the administrator of the deceased against the railroad company under the provisions of sections 1685 and 1692 of the Revised Statutes of 1893, being respectively sections 1483 and 1529 of the General Statutes of 1882.' That is correct.

" Now, the second request of the defendant is as follows: ' That section 1685 requires the ringing of a bell of 30 pounds weight, or blowing of a whistle, by the engineer or fireman of a locomotive engine at least 500 yards from any crossing of a public road by a railroad track, and that the bell should be kept ringing or the whistle blowing until the locomotive passes the crossing.' That is correct, and I so charge you.

" The second request of the plaintiff is as follows: ' If the testimony satisfies you that Henry H. Wragge was injured in his person by collision with the engine or cars of the defend-

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ant at the crossing in question, and that such crossing was a public highway or street or traveled place, and it appears that the corporation neglected to give the signals required by section 1685 of Revised Statutes, and that such neglect contributed to the injury, the defendant corporation is liable for all damages caused by the collision, unless it is shown that, in addition to a mere want of ordinary care, the person injured was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury.' That is correct. The plaintiff alleges that the injury occurred at a public road and way, and the plaintiff must prove his case as stated in his complaint. I shall go back presently to that question of public road or way.

"The third request of the defendant is as follows: 'That section 1692 makes any railroad company neglecting to give the signals required by the statute liable in damages for any injury to any person at the crossing of a public road, provided that failure to give such signals was a proximate cause of the injury.' That request I shall have to modify by changing the word 'proximate,' so as to make it read, 'that such failure to ring a bell, etc., contributed to the injury.'

"Now, the plaintiff's third request is as follows: 'If you believe that the road along which deceased was traveling was a public road, or traveled place, and that he was negligently killed by the defendant where such road or traveled place is crossed by the defendant's railroad, then the proof of contributory negligence on his part, in order to have the effect of dispensing the law and absolving the defendant from all liability, is required to be clear and convincing. It is not to be assumed that a man in his senses will heedlessly imperil his own life.' That is correct. It is taken literally from the decision of the supreme court. Just here I will tell you what is the meaning of negligence. In *Renneker v. Railway Co.*, 20 S. Car. 222, the supreme court has defined negligence as follows: 'Negligence is a failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in the omission or commission. The duty is divided and measured by the exigencies of the action.' The statute uses the word 'gross' negligence.

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Gross negligence is the absence of that kind of care which even a careless and indifferent person would be expected to exercise under the existing circumstances.

“ The fourth request of the defendant is as follows: ‘ That the plaintiff cannot recover in this action for any other negligence than the failure to give the statutory signals; and, even if the jury find from the evidence that the railroad company was negligent in other respects, they would not be justified in finding a verdict against the company.’ That I charge you as correct, because that is the allegation set out in the complaint.

“ The fourth request of the plaintiff is as follows: ‘ Culpable negligence, which contributed to the injury, must always defeat the action, but the nature of the primary wrong has much to do with the judgment, whether or not the alleged contributory fault was blameworthy. If it was of a negative character, such as lack of vigilance, and was itself caused, or would not have existed, or no injury would have resulted from it but for the primary wrong, it is not in law to be charged to the injured one, but to the criminal wrongdoer.’ That is copied from the supreme court decision, and I so charge you.

“ The fifth request of the plaintiff is as follows: ‘ A man approaching a railroad at a public highway, street, or traveled place has a right to rely upon the railroad’s giving the signals required by the statute for that place.’ I so charge you, and in connection with that I charge you the twelfth request of the defendant, which is as follows: ‘ That it is the duty of the person approaching a railroad crossing to use his senses of sight and hearing in order to protect himself from the danger of a collision.’ Those two requests I have charged together because a man may rely upon the railroad train giving the signals required by law at that place, and it is also the duty of the person approaching the crossing to use his senses of sight and hearing in order to protect himself from injury, and to listen for the signals the railroad company is required to give.

“ Now the sixth request of the plaintiff is as follows: ‘ By the term “traveled place,” as used in the statute, is meant a place across which the public not only have been accustomed to travel, but where they have a right to travel; and if the jury find that the deceased was crossing at such a place, then he was entitled to the statutory signals.’ That is correct, and

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in connection with that I will take up the defendant's fifth request: 'That in order to justify the jury in finding a verdict against the defendant, the plaintiff, the administrator, must prove by the preponderance of the evidence that the deceased was killed through collision with the defendant's locomotive; also that the road over which deceased was crossing the track of the defendant was a public road, and that deceased was killed in crossing it; and, further, that the statutory signals were not given; and, further still, that the failure to give these signals caused the death of the deceased,—that is to say, that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death.' I cannot go as far as that request goes. The statute says, 'If the neglect to give such signals contributed to the injury,' and I have to modify that request in accordance with the statute. If the failure to give these signals contributed to death of the deceased, it might be sufficient. So modified, I charge you that request.

"The sixth request of the defendant is: 'That unless the plaintiff prove that the crossing referred to in the evidence was the crossing of a public road, plaintiff cannot recover, even if the bell was not rung nor the whistle blown.' I charge you that as correct, because that is the allegation in the complaint.

"The seventh request of the defendant is as follows: 'That, in order to prove that the crossing was that of a public road, plaintiff must show by the preponderance of the evidence that the public had been granted by the owners of the land over which the road passed the right to use the road, or that the public had exercised such right continuously, adversely, and without interference for full twenty years.' And the eighth request of the defendant is as follows: 'That the mere fact that the public were in the habit of using the road alleged to be a public road for twenty years would not be sufficient to make the road a public road; but plaintiff must, in addition, prove that the owner of the lands recognized the right of the public to use the road; in other words, that the road was not simply used with the knowledge and acquiescence of the owners, but there was something more, showing the adverse use of the road by the public.' Now, in regard to the roads this complaint alleges that Mr. Wragge was killed on the public road or way crossing the railroad track. In our

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statute the term 'public highway' is used as designating those roads laid out by special act of the legislature, or a road created in pursuance of the legislature, or roads taken charge of by the public officers under authority of law. They are such as are usually laid out by the officers of the law in the first instance, or are taken in charge of by the officers of the law, and kept up and maintained, upon which persons are required to work, or are kept in repair at the public expense. I need not go into the definition or attempt to explain to you the private right of way which one or more men may have to pass over the lands of another, but will go directly to what we sometimes term 'neighborhood roads,' where they are known by various names. It means this: that a 'path,' as termed in the old books, may be beaten across the premises of another or others, and the public travel along that line may continue in order to make it a public road; it is not essentially necessary, nor is it necessary that the public officials of the government should have supervision or control of that road. It is a public road if the public have used it for twenty or more years adversely, because the idea is this: Persons may pass or repass in a road or traveled way across the premises of another. If they do so by mere acquiescence or consent of the owners of the land, that does not give them a right in the sense in which that term is used. On the contrary, if they pass by permission, their right then is the right of permission,—a leave to do so. But a neighborhood road becomes a public road when the twenty years have elapsed, and the public have acquired the right to travel it; a right in themselves, separate and distinct from a mere permission. What constitutes that right? The traveling of a road from time immemorial, or for over twenty years, or for so much longer as the evidence may disclose, would be a question of fact for your consideration in determining whether the public had a right or not to travel that road. Upon that I can express no opinion. The right, if it once exists, or the public exercise it, or if it is once asserted and maintained by the public, or that right is acquiesced in or recognized by the owners of the lands, recognized in the public at the expiration of twenty years, it ripens and grows into a legal right. It may have begun in trespass, but use for twenty years has ripened into a legal right.

“The seventh request of the plaintiff is as follows: ‘The

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fact that all persons who desire to do so have been accustomed to cross a railroad at a certain place, with the knowledge and acquiescence of the railroad company, is not, of itself, sufficient to establish the legal right to cross; but there must be something more, something to show an adverse use of the crossing, or something to show that the railroad company recognized the right of the public to cross at the point in question.' I so charge you.

" The eighth request of the plaintiff is as follows: ' If from the testimony you find that the crossing in question has been used by the public for twenty years or more, and the use has been of an adverse character, or that this right to cross by the public has been recognized by the railroad company, then the crossing is a " traveled place " within the meaning of the statute, and the deceased was entitled to statutory signals.' That is correct, because the law requires these signals to be given at a public highway, street, or traveled way crossing the railroad, and it is the duty of railroads to know or to determine what are public highways, streets, or traveled places, and to ring a bell or to sound a whistle as the statute requires. It would not do for the railroad to be the sole judge, and to be able to say that a certain highway is not a highway, and thereby establish the fact. The law says what a highway, public road, or traveled place is; and what the law says is a public highway, road, or traveled place is a place where these signals must be given.

" The ninth request of the plaintiff is as follows: ' When a railroad company knowingly permits a place not a highway crossing to be used as a crossing by the general public for years, it is bound to use reasonable care at such crossing, even though there is no statute on the subject.' As an abstract proposition of law, that is correct; but, as I have charged you, this action is brought upon an allegation in the complaint based upon the statute, which I have read to you; and, while the proposition is abstractly correct, I do not see its relevancy to this case.

" The tenth request of the plaintiff is as follows: ' If from the evidence you find the crossing in question is not a " traveled place " within the meaning of the statute, but that it has been used by the general public as a crossing for years, and that this use has been acquiesced in by the railroad company, then such company is bound to use reasonable care and

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prudence at such crossing; and it is for you to determine whether or not reasonable care and prudence required that at the place in question some signals should be given of an approaching train, and whether such signals were given is a question of fact for you.' I charge you that it is a question of fact for you to say under this complaint whether the railroad company failed to sound a whistle or ring a bell, as alleged in the complaint; and, as I said on the preceding request, as an abstract proposition of law it is correct.

"The ninth request of the defendant is as follows: 'That if the jury find from the evidence that the road referred to in the testimony was entirely upon the uninclosed lands of a private corporation, and used by that corporation for its own purposes and for the purposes of its employees, agents, or customers, and that it led only from the public road to the phosphate works of the owner of the land, that would not justify the jury in finding the road to be a public road.' I have charged you what a public road was, and I cannot charge you upon the facts of this case; but, if the testimony satisfies you as to the existence of the facts, that law is correct.

"The tenth request of the defendant is as follows: "That, even if the jury find that the road referred to in the testimony was a public road, the mere fact that the bell was not rung or the whistle blown for at least 500 yards from the crossing, and kept ringing or blowing until the locomotive passed the crossing, would not be sufficient proof of negligence; but that the plaintiff must prove, in addition to the failure to give these signals, that, but for such failure, the injury would not have occurred.' I cannot charge you that request, and I refuse it.

"The eleventh request of the defendant is as follows: 'That, even if the jury find from the evidence that the railroad company was guilty of negligence, they are not authorized in finding a verdict against the company if they find that the deceased was not exercising slight care in avoiding collision with the company's train.' That is substantially correct, because the absence of slight care or neglect is given in the definition of gross negligence.

"The thirteenth request of the defendant is as follows: 'That no damage can be recovered in this suit if the jury conclude to find any damages except damages for the actual loss of deceased's wife and children by his death, and nothing must be given for the sufferings of deceased or the loss of his

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society to the widow, or the wounded feelings of the widow or children, or as a punishment to the railroad company.' That is correct, and I so charge you.

"The fourteenth request of the defendant is as follows: 'That where a public way depends upon adverse use, by adverse use is meant such use as is indicative of a use against the will and consent of the landowner.' That is correct, and I have already charged you that.

"The fifteenth request of the defendant is as follows: 'That recognition by the owner of a legal right in the public to a road means a recognition of their right to use it against his will and consent.' That is correct, and I have already charged you that, if the public assert an adverse right to use it, and do use it for twenty years, it ripens into a legal right, and makes it a public highway.

"The eleventh request of the plaintiff is as follows: 'If you find that the verdict should be for the plaintiff, then you should give such damages as you may think proportioned to the injury resulting from the death of Henry H. Wragge to his widow and children, respectively, for whom and for whose benefit this action is brought. And in estimating damages the circumstances to be considered are the age of the deceased, the amount of his earnings, his habits, health, and the probable duration of his life.' That is correct, only I do not limit you to that. I leave the entire testimony to you, upon which you may see fit to base your verdict. Now, gentlemen, this action is brought for the benefit of the widow and children to recover from the railroad company the loss they have sustained by the death of the father and husband. If you find that the railroad company killed Henry H. Wragge through negligence, as described in the complaint, then what was the loss? What was the loss to them? What was their support and subsistence, and what did they receive from him? It may be—and I do not mean to express any opinion—that a man may make a large amount of money, and yet all of it may not be expended upon the family; it may not be necessary for their support and maintenance. Therefore the question you will consider is to compensate them in damages for the loss in a pecuniary point of view the widow and children have sustained by being deprived of husband and father. In writing your verdict, if you find for the plaintiff you will say, 'We find for the plaintiff' so many dollars, writing out the amount in

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words. If you find for the defendant, your verdict will be, 'We find for the defendant.'

The following exceptions were made and filed by the defendant: "The defendant herein excepts to the ruling and instructions of his honor, the presiding judge, in charging the jury, in the following particulars, viz.: (1) That his honor, the presiding judge, erred in refusing to charge the jury as requested by defendant: 'That section 1692 makes any railroad company neglecting to give the signals required by the statute liable in damages for any injury to any person at the crossing of a public road, provided that failure to give such signals was a proximate cause of the injury.' (2) That his honor, the presiding judge, erred in modifying the said request to charge by changing the word 'proximate' so as to make it read 'that such failure to ring a bell, etc., contributed to the injury,' without explaining to the jury the meaning of the word 'contributed.' (3) That his honor, the presiding judge, erred in refusing to charge, as requested by defendant, 'that plaintiff must prove by the preponderance of the evidence' that the statutory signals were not given, and, further, that the failure to give these signals caused the death of the deceased; that is to say, that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death. (4) That his honor, the presiding judge, erred in modifying the said foregoing request by changing the expression, 'that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death,' into these words: 'If the neglect to give such signals contributed to the injury,' without explaining to the jury the meaning of the word 'contributed.' (5) That his honor, the presiding judge, erred in refusing to charge, as requested by defendant: 'That, even if the jury find that the road referred to in the testimony was a public road, the mere fact that the bell was not rung, or the whistle blown, for at least 500 yards from the crossing, and kept ringing or blowing until the locomotive passed the crossing, would not be sufficient proof of negligence, but that the plaintiff must prove, in addition to the failure to give these signals, that, but for such failure, the injury would not have occurred.' "

Defendants ex-
ceptions.

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Jos. W. Barnwell, for appellant.

Murphy & Legare, for respondents.

MCIVER, C.J.—The plaintiff, as administratrix of the personal estate of her deceased husband, brings this action to recover damages for the killing of her said husband by the defendant company's negligence. The allegation is that the deceased was killed by a collision with the engine of said company, while attempting to cross the railroad track at a point where it was intersected by a public road along which the deceased was traveling; and that such collision was caused by the failure of the defendant company to give the signals required by section 1685 of the Revised Statutes of 1893 when approaching such a crossing. At the outset of the case the circuit judge ruled (to which ruling there was no exception) that the only cause of action set out in the complaint was the failure on the part of the defendant to give the signals required by the statute when approaching such a crossing, and the trial proceeded under that ruling. At the close of the testimony his honor, Judge ALDRICH, before whom the case was tried, charged the jury as is fully set out in the "case." The jury having rendered a verdict in favor of the plaintiff for the sum of \$12,500, a motion for a new trial on the minutes was made, and the circuit judge ordered a new trial unless the plaintiff would remit all over the sum of \$6,020.50. The plaintiff entered a remittitur for such excess, and, judgment having been entered for the balance after deducting the amount remitted, the defendant appealed, and served the exceptions set out in the record. For a full understanding of the case it will be necessary to set out in the report of the case a copy of the judge's charge, in which he considers, in detail, the request to charge, as well as the exceptions taken for the purpose of this appeal. It seems to us that these exceptions present but two general questions: (1) Whether there was any error in refusing to charge, as requested, that, in order to render the defendant liable, the jury must conclude that the failure to give the required statutory signals was the "proximate" cause of the injury sustained; (2) whether there was any error in omitting to explain to the jury the meaning of the term "contributed" as used in the statute, and in refusing to adopt the interpretation of

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that term as suggested in the defendant's request to charge, because it went too far.

This being an action under section 1692 of the Revised Statutes of 1893, it is proper to set out here the precise terms of the statute, which reads as follows: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this article, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of law, and that such gross or wilful negligence, or unlawful act, contributed to the injury." Now, it will be observed that there is nothing in the language found in this section calculated to convey the idea that the legislature intended to make the liability of the railroad company dependent upon the fact that the neglect to give the statutory signals was the proximate cause of the injury complained of; and, on the contrary, the language used implies no such intention. All that the statute requires is that the neglect to give the prescribed signals shall contribute to the injury, which, in our judgment, is a very different thing from saying that such neglect must be the proximate cause of the injury. In the case of *Thompson v. Railroad Co.*, 24 S. Car. 366, the action was to recover damages for the destruction, by fire, of certain property, under the allegation that such fire was communicated by sparks from the locomotive of the defendant company, and the action was based upon the provisions of section 1511 of the General Statutes of 1882; and it was held that under the provisions of that section the question as to proximate or remote cause was eliminated, and the only inquiry was whether the case fell within the terms of that section. As we said in that case: "Under the terms of the act there can be no necessity for an inquiry as to whether the fire caused by the act of the company or its agents was the proximate or remote cause of the destruction of the property in question, as would have been the case under the old law; for it declares in absolute terms, without any qualifications, that the company

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shall be liable for the destruction of property by fire which originated within the limits of the right of way from some act of the company or its agents or employees, and this precludes any inquiry as to whether the fire so originating was the proximate or remote cause of the damage complained of." While it is true that the case just quoted from arose under a different section from that upon which the present action is based, yet, as it seems to us, the principle upon which that decision rests is applicable here. That principle is that, where a statute imposes a liability under certain conditions therein prescribed, the only question is whether such conditions are found to exist in a given case, and not whether, under the general law, apart from the provisions of the statute, liability would accrue. Now, in the case under consideration the question is whether the conditions prescribed in section 1692 of the Revised Statutes, upon which this action is based, are found to exist; so that the first inquiry is, what are those conditions? and this is answered by the express terms of the statute, which declares that when a person is injured by collision with an engine of a railroad company at a crossing, and it appears that such company neglected to give the prescribed statutory signals, "and that such neglect contributed to the injury," the company shall be liable, except in certain cases, which need not be specified here, as there is no pretense that such exceptions are applicable here. Now, under the express terms of this statute, the only inquiry, so far as the point we are now considering is concerned, is not whether the neglect to give such signals was the proximate cause of the injury,—as might have been the case, apart from the provisions of this statute,—but the inquiry is, in the language of the statute, whether "such neglect contributed to the injury." The cases of *Glenn v. Railroad Co.*, 21 S. Car. 466; *Petrie v. Railroad Co.*, 29 S. Car. 303; and *Brown v. Laurens Co.*, 38 S. Car. 282.,—cited by counsel for appellant,—are not, in our judgment, in point. In *Glenn's Case* the negligence complained of was the failure to supply the engine with a headlight; and, as it conclusively appeared from the plaintiff's own testimony that the absence of the headlight "had nothing to do with causing the injury," as stated in one part of the opinion, and, in another place, "that the absence of the headlight in no way contributed towards causing the injury complained of," it was very clear that the plaintiff could not

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recover; for, while there was evidence of negligence on the part of the railroad company in failing to provide a headlight, there was no evidence tending to show that such negligence had anything whatever to do with causing the injury, and in no way contributed to such injury, for, as was pointedly said by that great jurist, GIBSON, C.J., in *Hart v. Allen*, 2 Watts 116, "the defendant is answerable for the consequences of negligence, and not for its abstract existence," and hence such negligence must, in some way, be connected with the injury complained of. In that case, certainly, there is nothing to indicate that the court held that the negligence alleged must be the proximate cause of the injury complained of. So, too, in *Petrie's Case*, the court, in passing upon the question whether the motion for nonsuit was properly refused, after affirming the rule as laid down in *Glenn's Case*, proceeded "to inquire whether there was any evidence tending to show that the failure on the part of the defendant to give the signals required by statute in any way contributed to the injury complained of"; and not a word was said indicating that it was necessary to show that such failure was the proximate cause of the injury complained of. As to the case of *Brown v. Laurens Co.*, it will be sufficient to say that the action there was not based upon any such statute as that upon which the present action is based, and hence what was said as to proximate cause does not apply here. We are of the opinion, therefore, that so much of the exceptions as impute error to the circuit judge in refusing to instruct the jury that, to entitle the plaintiff to recover in this case, they must be satisfied that the negligence imputed to the defendant was the proximate cause of the injury complained of, must be overruled.

This brings us to the consideration of the second general question above stated. This question may be divided into two branches: First, whether the circuit judge erred in omitting to explain to the jury the meaning of the term "contributed," as used in the statute; second, whether the interpretation put upon that word in defendant's requests to charge was the correct interpretation. As to the first branch of this inquiry, it is sufficient to say that there was no request that the circuit judge should define or explain the meaning of the term "contributed" in his charge; so that the only real inquiry is whether the circuit

Failure to explain.

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judge erred in refusing the request of defendant to charge the jury, as asked in one of the requests, that the plaintiff must not only prove that defendant failed to give the statutory signals, but must also show "that the failure to give these signals caused the death of the deceased; that is to say, that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death"; or, as was asked in another request, that the jury should be instructed that, to enable the plaintiff to recover, she must prove, "in addition to the failure to give these signals, that, but for such failure, the injury would not have occurred." These two requests, though expressed in different phraseology, practically amount to the same thing, to wit, that the plaintiff could not recover unless the jury should conclude from the evidence, not only that defendant neglected to give the required statutory signals, but also that such neglect was the efficient cause of the injury complained of. Now, it is quite certain that the statute does not contain any such language as that used in either request, but only requires that, as a condition precedent to defendant's liability, it shall be made to appear that the neglect to give the signals "contributed" to the injury complained of. So that the practical inquiry is whether this word, by which the legislature saw fit to express its intention, should properly be interpreted to mean the same thing as that expressed by the words used in the request to charge. The well-settled rule is that words used in a statute must be given their ordinary and popular signification, unless there is something in Construction. the statute requiring a different interpretation. As was held by this court in *Akers v. Rowan*, 33 S. Car., at page 470, 12 S. E. 171: "One of the primary rules in the construction of a statute is that the words used therein should be taken in their ordinary and popular signification, unless there is something in the statute requiring a different interpretation. Cooley, Const. Lim. 58, 59; Potter, Dwar. St. 127-146. This is really nothing more than a rule of common sense, for it must be supposed that the legislature, in enacting a statute, intended that the words used therein should be understood in the sense in which they are ordinarily and popularly understood by the people, for whose guidance and government the law was enacted, unless there is something in the statute showing that the words in question were used in some other sense."

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Now, as it is apparent that there is nothing in the statute here under consideration to indicate that the word "contributed" was used in any other than its ordinary and popular signification, the only inquiry is, what is such signification? This word is of frequent occurrence in the text-books and in the decided cases, where it most frequently appears in questions of contributory negligence. The foundation upon which the doctrine that contributory negligence on the part of the plaintiff will constitute a defense to an action to recover damages for an injury caused by the negligence of another rests is that, when such injury may be partly the result of the defendant's negligence and partly the result of the plaintiff's own negligence, the court will not undertake to graduate or apportion the damages according to the contribution from either side, but will leave the parties as they found them. This repels the idea that the word "contributed" or "contributory" ever has been understood to bear such an interpretation as that claimed for it by appellant. On the contrary, it seems to us that in the ordinary and popular signification of the term, one thing is understood to contribute to a given result when such thing has some share or agency in producing such result, and is not understood to convey the idea that such thing was the efficient cause of such result in the sense that without it such result would not have occurred; for it is possible such result may have occurred, even in the absence of the thing which is supposed to have had some share or agency in producing such result. To apply this to the case in hand, it may have been possible that the disaster would have occurred even if there had been no neglect on the part of the defendant to give the signals; and yet, if there was such neglect on the part of the defendant company, and such neglect contributed in any way to the disaster, in the sense that it had any share or agency in bringing about the disaster, the defendant, under the express terms of the statute, would still have been liable. It seems to us, therefore, that there was no error on the part of the circuit judge in instructing the jury in the express terms of the statute, and no error in refusing to instruct the jury as requested by the defendant.

Having reached this conclusion, the position taken by the counsel for respondent, that none of the requests to charge could properly be considered, because not presented to the circuit judge in the form prescribed by the rules of court, be-

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comes immaterial in the case, and therefore, ordinarily, would not be considered. But as that position involves a question of practice which it is important for the interests of the bar to settle, we will not decline to consider it now. This position is based upon the rule of the circuit court which, among other things, requires counsel to note, in the margin opposite each request to charge, the authorities relied on to support the position of the law contained therein, and produce the same when required by the court. This position is conclusively disposed of by the fact that it nowhere appears that any such position was taken before the circuit judge, or that he was requested to make, or did make, any ruling upon the subject; and hence, under the well-settled rule, there is nothing before this court to review. Besides, it appears that the circuit judge, without objection, either from counsel or from the court itself, so far as the "case" shows, did consider and dispose of each request; and, in the absence of any evidence to the contrary, we must assume that the requests were submitted in proper form. The point of the objection seems to be that counsel for appellant failed to note, in the margin of his requests, the authorities upon which he relied; but, for all that appears in the "case," no authorities were relied upon, and, if so, of course none could be noted. At all events, it seems to us that this court would be going very far—much further than we are disposed to go—to refuse to consider whether a circuit judge has erred in refusing to charge a proposition of law, simply because it was presented in a request alleged to have been framed in disregard of a technical requirement of a rule of the circuit court; especially when such refusal was not based upon a failure to comply with such technical requirement. The judgment of this court is that the judgment of the circuit court be affirmed.

Walker v. Louisville & N. R. Co.

WALKER

v.

LOUISVILLE & N. R. Co.

(Supreme Court of Alabama, May 28, 1896.)

Recovery of Goods Delivered through Mistake.—In an action of detinue by a carrier to recover goods delivered by mistake to a person who fraudulently represented himself as assignee of the consignee of the shipper, and who had paid the freight charges demanded by the carrier, it was *held*, that the goods could not be recovered by the carrier until he had repaid the freight charges.

APPEAL from Montgomery county circuit court. *Reversed.*

Gordon Macdonald, for appellant.

Thos. G. and Chas. P. Jones, for appellee.

COLEMAN, J.—This is an action of detinue, instituted by the appellee railroad to recover certain horses. The plaintiff's right of action grows out of the following state of facts:

Case stated. Walker & Pfefferling shipped by the plaintiff, as a common carrier, a car load of horses to Montgomery, consigned to themselves. The defendant (appellant) stated to the plaintiff that he was the assignee of the consignees, and in this right claimed that the horses should be delivered to him. The plaintiff informed him of the amount of the cost and charges of transportation, and offered to deliver the horses upon payment of the amount, under the belief that it covered all charges; and upon such payment the plaintiff delivered to him the horses. Soon afterwards the plaintiff ascertained that defendant was not the assignee of the consignees, and was not entitled to the horses, and that there remained an unpaid balance due for the horses, secured by the retention of the title in the consignors, evidenced by the bill of lading, the horses having been consigned to the shippers. Upon ascertaining the mistake made by the delivery of the horses, the plaintiff demanded the payment of the balance due the shipper, and, this being refused, demanded

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that the horses be returned. The defendant offered to return the horses to the plaintiff upon being reimbursed the amount paid by him to the plaintiff as charges. This the plaintiff declined to do, and thereupon the defendant declined to return the horses. Upon the refusal to return the horses the plaintiff brought its action in detinue. We have not undertaken to state the facts literally as they appear in the pleadings, but have with sufficient accuracy to present the questions of merit involved in the litigation. The ruling of the court upon the pleading was, in effect, that plaintiff should recover upon these facts. In this conclusion we are of opinion the court erred. The act of the railroad carrier in delivering the property to the defendant, whether induced by fraud or mistake, did not operate to divest the title of the consignees, and, if the consignees had instituted this action, there is no statement of fact in the pleadings which would have defeated the action; but this action is by the railroad. The plaintiff, when it received the horses, and was in possession of them as a common carrier, had a special property in the horses which would support an action in detinue or trover or trespass against any one who wrongfully dispossessed it, subject to any legal conditions which applied. The general rule is that, where any person has been induced to deliver anything by such means (whether by fraud or mistake of fact) that he is entitled to rescind the transaction, he must, in order to do so, first restore to the other party whatever may have been received in exchange for the thing he seeks to recover back. *Evans v. Gale*, 17 N. H. 573; *Jones v. Anderson*, 82 Ala. 302. In this case the plaintiff parted with the possession and such special property in the horses as was vested in it as a common carrier or bailee upon the consideration of the payment of a certain sum of money. It seeks to recover back the property upon the grounds that it delivered the property to defendant by mistake of fact or fraud, and at the same time refuses to repay the defendant the money received. We cannot perceive any sound reason why the general rule does not apply to the plaintiff. The appellee cites the case of *Young v. Railway Co.*, 80 Ala. 100, in support of the contention that plaintiff could maintain the action without a restoration of the money received. There are some expressions in the opinion which sanction the contention, but the case, rightly construed with reference to the facts, is not an authority

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on the question. If in the case cited the suit had been by the Alabama Great Southern Railroad Company, a common carrier, and original bailee of the consignee, to recover possession of the pool table from one who had paid freight charges, and to whom it had been delivered by fraud or mistake upon such payment, the cases would have been similar. But in that case the pool table had rightfully come back from the person to whom it had been delivered to the possession of the Alabama Great Southern Railroad Company, and the suit was by the person to whom it had been delivered against the common carrier or its agent, in possession, and the question was whether the defendant could defend upon the title of the original consignee, who had never parted with the title or ownership. The court held that the plaintiff had never acquired a valid title to the pool table by its delivery, and, though the general rule was that the bailee could not dispute the title of his bailor, it might deliver the goods to the true owner, and this would be a good defense against the bailor. If the plaintiff in this case had regained legal possession of the horses from the defendant, and was itself being sued by the defendant in detinue, it may be that under the influence of the decision in 80 Ala., *supra*, it could defend upon the title of the rightful owner. We cannot extend the principle declared in that case so far as to hold that the plaintiff becomes reinvested with the special property or title merely upon a demand, without repayment of the money which it had received. It seems contrary to authority and principles of justice to permit plaintiff to recover the horses, and at the same time to retain the money. We do not deem it necessary to consider the pleadings specially, as it is evident the case was tried throughout upon the proposition that plaintiff could maintain the action without an offer to return the money received from the defendant. Whether the defendant was able to return the horses upon restoration of the money, and was thus entitled to it, presents a question not before us on this appeal. Reversed and remanded.

Louisville & N. R. Co. v. Tennessee Brewing Co.

LOUISVILLE & N. R. Co.

v.

TENNESSEE BREWING CO.

(*Supreme Court of Tennessee, May 30, 1896.*)

Injuries to Goods—Burden of Proof on Last of Connecting Carriers.—The last of a series of connecting lines over which freight is transported is liable for loss or damage occurring to such freight, unless it appears that the loss did not occur upon the road, and the burden of proof is upon said last road to show that the loss did not occur upon its line.

Liability of Connecting Carriers.—If the injury to the goods occurred before they reached the territory of the delivering carrier, in consequence of a defective car furnished by any of the preceding carriers, the delivering carrier is not liable, but if the injury arose on the line of the delivering carrier from a defective car furnished by any preceding carrier, the delivering carrier is liable.

APPEAL from Shelby county circuit court. *Reversed.*

J. P. Houston and McCorry & Bond, for appellant.

F. Zimmermann and H. F. Dix, for appellee.

MCALISTER, J.—The defendant in error recovered a verdict and judgment in the Second circuit court of Shelby county against the railroad company for the sum of \$438.30, damages to a car load of hops. The railroad company appealed, and has assigned errors. The Case stated. record shows that on November 1, 1889, S. & F. Uhlman shipped from Pratt's station, Oneida county, N. Y., a car load of hops, consigned to the Tennessee Brewing Company, at Memphis, Tenn. A through bill of lading was issued by the New York, Ontario & Western Railroad Company, the receiving carrier; and, after passing through the hands of a series of connecting carriers, the shipment was delivered to the consignee, at Memphis, by the Louisville & Nashville Railroad Company. The defendant in error proved that when the hops were shipped at Pratt's station, N. Y., they were sound and sweet, but when delivered at Memphis they were

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wet and musty. It was a much-controverted question of fact upon what line the damage occurred. As already observed, the present suit is alone against the delivering carrier. It is well settled in this state that, although the initial carrier may be responsible for the entire transportation, any subsequent and auxiliary carrier is equally liable for any default occurring upon its line. Railroad Co. v. Weaver, 9 Lea 38, 16 Am. & Eng. R. Cas. 218; Railroad Co. v. Holloway, 9 Baxt. 188. And in the latter case it was held that the last of a series of connecting lines over which freight is transported is liable for loss or damage, subject to the limitations contained in the contract of shipment with the first line, unless it appears that the loss did not occur on the road, and that the burden of proof is upon said road to show that the loss did not occur on its line. Transportation Co. v. Bloch, 86 Tenn. 416, 35 Am. & Eng. R. Cas. 579. Says Mr. Hutchinson, in his work on Carriers (section 761): "But a connecting carrier who has completed the transportation and delivered the goods to the consignee in a damaged condition, or deficient in quantity, will be held liable in an action for the damage or deficiency, without proof that it was occasioned by his fault, unless he can show that he received them in the condition in which he has delivered them. The condition and quantity of the goods when they were delivered to the first of the connecting carriers being shown, the jury has the right to infer that they continued in that condition to the time of their delivery to the carrier completing the transportation and making the delivery to the consignee, and that the injury or loss occurred while they were in his possession. And it has been held that the presumption which applies to the last of a line of connecting carriers, that the goods were delivered to it in the same condition as they were delivered to the first carrier, applies also to any intermediate carrier, and in such cases the receiving carrier will be regarded as the agent of the succeeding connecting carriers for the purpose of accepting the goods for transportation over the connecting lines, and the receipt or bill of lading given by such receiving carrier will be competent evidence, in an action against any of the succeeding carriers into whose possession the goods may have come, to show the delivery for transportation, the condition of the goods at the time of such delivery, and the terms of the shipment."

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ing carriers.

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The circuit judge charged the jury, correctly, "that in this state the last of a connecting line of carriers is liable for the loss or damage to the freight, if lost or damaged while in transport over such last connecting line, and the burden of proof is upon the last connecting line to show that the loss or damage did not occur through the negligence of the officers or agents of the said last connecting line of road." It is not controverted that this charge was in entire accord with our authorities, but it is assigned as error that the trial judge submitted to the jury the following instructions, to wit: "If you find from the evidence that the safe transportation of hops required rain-proof cars, and if you find, further, that the loss occurred to plaintiff through the failure of the first or any connecting carrier to furnish such cars, then the defendant is liable." Again, the following instruction is assigned as error, for the reason that it embodies the same objectionable feature, to wit: "If the proofs satisfy you as to those two points, the plaintiff has made out a *prima facie* case, and you should find for it, unless the defendant has proven to your satisfaction that it was in no way negligent, and that the damage to the hops did not occur on its line, or did not occur through means of a defective car furnished by itself, or connecting carrier." The proof showed that the hops in question had been transferred to several cars during the transit, and it was a disputed question where and how the damage occurred. If the injury to the hops occurred before the car reached the territory of the delivering carrier, and in consequence of a defective car furnished by the initial or any intermediate carrier, it is manifest the delivering carrier would not be liable. If, however, the loss occurred on the line of the delivering carrier, in consequence of a defective car furnished by any preceding carrier, the delivering carrier would be liable. Railroad v. Dies, 91 Tenn. 181; Pennsylvania Co. v. Roy, 102 U. S. 452, 1 Am. & Eng. R. Cas. 225. The circuit judge, however, charged the jury, without limitation or qualification, that, if the loss to plaintiff occurred through the failure of the first or any connecting carrier to furnish rain-proof cars, the defendant company would be liable. The jury must have inferred from this instruction that it was an indispensable condition of defendant's exonerated from liability that it show, not only that the loss did not occur on its line, but that it was

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not occasioned by a defective car furnished by itself or any connecting carrier, regardless of where the damage actually occurred. For the error indicated the judgment is reversed, and the cause remanded for a new trial.

NOTES

Defective Cars.—A second carrier cannot avoid liability for injury to goods caused by the defective condition of a car on the ground that the car belonged to the first carrier. *Wallingford v. Columbia, etc., R. Co.*, 26 S. Car. 258, 30 Am. & Eng. R. Cas. 40. Reviewing *Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. Car. 353, 16 Am. & Eng. R. Co. 194.

Liability of railroad company transporting cars of another company, see notes, 32 Am. & Eng. R. Cas. 524, 18 Am. & Eng. R. Cas. 511.

A connecting railroad company, which is a carrier engaged in carrying loaded cars from the tracks of one railway company and placing them at the disposal of the consignee on the tracks or side tracks of another company, and returning them after they are unloaded, is not responsible for the destruction by fire on the day of delivery and before they are unloaded, of cars which it has delivered on the private track of the consignee. *East St. Louis Connecting R. Co. v. Wabash, etc., R. Co.*, 123 Ill. 594, 32 Am. & Eng. R. Cas. 522.

TEXAS CENTRAL R. CO

v.

FRAZIER *et al.*

(*Supreme Court of Texas, June 22, 1896.*)

Engineer and Brakeman Fellow Servants.—An engineer whose duty it is to give signals to the brakemen of a train, in accordance with the rules of the railway company, in reference to the use of the brakes, is a fellow servant of such brakemen.

ERROR to Third supreme judicial district court of civil appeals. *Reversed.*

Cotton & Roberts and *Baker & Campbell*, for plaintiff in error.

Dewey Sankford, Lindsey & Goodson, and *Eidson & Allen*, for defendants in error.

Texas Central R. Co. v. Frazier

DENMAN, J.—Mrs. Etta Frazier, in behalf of herself and minor son, sued the Texas Central Railroad Company to recover damages claimed to have been suffered by reason of the death of her husband, J. W. Frazier, alleging (1) that such death was the result of carelessness of the engineer upon the freight train, in running over some cattle, causing the wreck of the train upon which said Frazier was one of the brakemen; and (2) that at the time of the accident said engineer was intrusted by the defendant railroad with the authority to direct said Frazier in performance of his duties as brakeman, and was therefore a vice principal of defendant. The evidence showed that under the rules of the company the train crew consisted of the engineer, fireman, conductor, and two brakemen, of which the deceased, Frazier, was one; that as they were running along at about the rate of 20 miles per hour, the engineer, fireman, conductor, and Frazier being on the engine, cattle were discovered lying on the track a short distance in front of the engine, whereupon the engineer gave the signal for brakes, and Frazier went back onto the cars for the purpose of setting the brakes, and while he was performing that duty the train ran over the cattle, resulting in a wreck of some of the cars, and injuries to Frazier from which he died. Though it is earnestly disputed by plaintiff in error, let it be conceded, for the purposes of this opinion, that the evidence warranted the jury in believing that the engineer was guilty of negligence resulting in Frazier's death. The evidence showed that under the rules of the company (1) the entire train crew were under the direction and control of the conductor during the trip; (2) it was the duty of the engineer, whenever in his judgment, in the operation of the train, it was necessary to have the brakes applied, to give certain signals therefor from the engine, such signals being the only method by which he could order the application of the brakes; (3) upon the giving of such signals by the engineer, it was the duty of the brakemen to apply the brakes. Mrs. Frazier recovered judgment against the railroad, which judgment being affirmed by the court of civil appeals, the railroad company, as plaintiff in error, has brought the case to this court, assigning as error that the court of civil appeals erred in not sustaining its assignment in that court to the effect that the court below erred in rendering judgment for plaintiff, because the verdict is without evidence in the record to sup-

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port it; there being no evidence that the engineer was a vice principal of the defendant company, as claimed by plaintiff. The question, stated in a different form, is, were the engineer and the brakeman Frazier fellow servants, under the act of March 10, 1891, which was in force at the time of the accident? If they were, the judgment must be reversed. In *Railway Co. v. Warner*, 35 S. W. Rep. 364, this court held that under the act of 1893 (which seems to be the same as the act of 1891, as far as this case is concerned), in order to constitute two persons fellow servants, the following distinguishing characteristics must be found concurring and common to them: (1) They must be engaged in the common service; (2) they must be in the same grade of employment; (3) they must be working at the same time and place; and (4) they must be working to a common purpose. We do not understand that any question is made as to the correctness of the construction placed upon the statute in that case, nor do we understand it to be denied that the first, third, and fourth of said characteristics are shown by the evidence to be concurring and common to the engineer and Frazier in the case before us; but defendant in error denies that they "were in the same grade of employment," for the reason that, under the *Warner Case*, the test as to whether they were in the same grade of employment was decided to be whether one had authority over the other while engaged in the common service, and the evidence here shows that the engineer had authority over Frazier, in that he had the power, by signal, to direct him to apply the brakes. The purpose of the statute was to impute to the master the negligence of an employee upon whom he has conferred authority or power to influence the action or volition of another employee in the performance of his duties. Under the common-law rule, as settled in this state before the statute, the negligence of an employee would not have been imputed to the master unless he had the power to employ and discharge, it being assumed that such power was necessary to subject the will of the latter to that of the former. The statute, however, is based upon the theory that the authority or power in one employee to superintend, control, or command, or direct another employee in the performance of his duties, as effectually influences and subjects to the former the will of the latter as does the power to employ and discharge. But it was not the purpose of the statute to im-

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pute to the master the negligence of an employee upon whom he had conferred no such power, but had merely imposed the duty, in certain contingencies arising in the course of his employment, of giving a signal whereby another employee would know that the occasion had arisen for him to perform some duty imposed upon him by the rules governing his employment, leaving such employee free to perform such duty in his own way under such rules. In such a case there is no subjection of the will of one to that of the other. Under the common-law rule, as established in Ohio, there is imputed to the "master the negligence of a servant to whom he has delegated authority over other servants." In the case of *Railway v. Ranney*, 37 Ohio St. 665, 5 Am. & Eng. R. Cas. p. 533, the question before the supreme court of Ohio was whether an engineer who gave the signal for the brakemen to take off the brakes was, in so doing, exercising any authority over the latter. Upon this question the court say: "Indeed, the only pretense found in the testimony for the claim of defendant in error that brakemen are subordinate to the engineer of the train is found in the fact that it is the duty of brakemen to observe and obey certain signals given by the engineer, to wit (rule 18): 'One long blast of the whistle is the warning of the approach of a train; one short blast is a signal for putting down brakes and stopping the train; two short blasts, for releasing the brakes and starting the train; three, for backing the train.' It is contended that the signals are in the nature of orders or commands which the engineer is authorized to give to brakemen, which they are bound to obey, and hence the relation of superior and subordinate is created. A majority of the court do not so understand either the purpose or effect of the rule. These signals are so named properly, and are intended to notify all concerned of the thing signified. They are addressed to the conductor as well as brakemen, and it is the duty of the conductor to see that brakemen perform the duty signified. This duty is imposed upon the brakemen by force of the rule itself, and not by virtue of any authority vested in the engineer over the brakemen. The signal is a mere notice. The rule is the order of the company to the brakemen directly. Suppose a train is signaled by a station agent, as this train was, to stop for orders. It thereby becomes the duty of the conductor, as well as of each employee on the train, to stop

for orders; and yet no one can contend that such station agent who gives the signal is the superior, and train crew subordinate employees of the company, within the meaning of the rule under consideration. A variety of signals, under a variety of circumstances, are required to be given by different employees of the company, to signify that an occasion exists for the performance of a particular duty; but it would be absurd to hold that in each case the employee giving the signal is a superior servant, to whom all others to whom information is thus communicated are subordinated, so that the company would be responsible to them for any act of negligence of the employee who gave the signal, whether such negligence was in giving the signal, or in the performance of other duties." *Railroad Co. v. Camp*, 65 Fed. Rep. 953. We are of the opinion that the signal given by the engineer for brakes was a mere notice to the brakeman Frazier that the occasion had arisen for him to perform a duty imposed upon him by the rules; that the fact that the engineer was intrusted by the company with the discretion of determining when the brakes should be applied, and to signal therefor, did not give him any "authority of superintendence, control or command," or "authority to direct" Frazier in the performance of his duties; that Frazier, in attempting to set brakes in the performance of his duties, was governed and controlled by the direction and command of the rule, and not of the engineer; and that, therefore, under the statute, they were "in the same grade of employment," and fellow servants. It follows that the assignment of error was well taken, and that the judgments of the trial court and court of civil appeals must be reversed, and the cause remanded.

NOTES

Engineer Fellow Servant of Brakeman—I. In General.—An engineer is a fellow servant of a brakeman.

United States.—*Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 31 Fed. Rep. 527; *Newport News, etc., R. Co. v. Howe*, 52 Fed. Rep. 362; *Keilley v. Belcher Silver Min. Co.*, 3 Sawy. (U. S.) 500; *Jordan v. Wells*, 3 Woods (U. S.) 527; *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243.

Alabama.—*Mobile, etc., R. Co. v. Smith*, 59 Ala. 245.

Colorado.—*Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484.

Illinois.—*St. Louis, etc., R. Co. v. Britz*, 72 Ill. 256; *Illinois Cent. R. Co. v. Keen*, 72 Ill. 512, following *Illinois Cent. R. Co. v.*

Houck, 72 Ill. 285; Louisville, etc., R. Co. v. Petty, 67 Miss. 255, 41 Am. & Eng. R. Cas. 444.

Indiana.—Wilson v. Madison, etc., R. Co., 18 Ind. 226.

Iowa.—Jeffrey v. Keokuk, etc., R. Co., 56 Iowa 546, 5 Am. & Eng. R. Cas. 568; Sloan v. Central Iowa R. Co., 62 Iowa, 728, 11 Am. & Eng. R. Cas. 145.

Kansas.—Kansas Pac. R. Co. v. Peavey, 29 Kan. 169, 11 Am. & Eng. R. Cas. 260.

Louisiana.—Wallis v. Morgan's Louisiana, etc., R. Co., 38 La. Ann. 156.

Maryland.—Abell v. Western Maryland R. Co., 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

Michigan.—Miller v. Chicago, etc., R. Co., 90 Mich. 230.

Missouri.—Connor v. Chicago, etc., R. Co., 59 Mo. 285.

New Jersey.—McAndrews v. Burns, 39 N. J. L. 117; Smith v. Oxford Iron Co., 42 N. J. L. 467.

New York.—Sherman v. Rochester, etc., R. Co., 17 N. Y. 153; Wright v. New York Cent. R. Co., 25 N. Y. 562; Warner v. Erie R. Co., 39 N. Y. 468; Moran v. New York Cent., etc., R. Co., 67 Barb. (N. Y.) 96; Mann v. Delaware, etc., Canal Co., 91 N. Y. 495, 12 Am. & Eng. R. Cas. 199.

North Carolina.—Ponton v. Wilmington, etc., R. Co., 6 Jones (N. Car.) 245; Hobbs v. Atlantic, etc., R. Co., 107 N. Car. 1, 44 Am. & Eng. R. Cas. 592.

Ohio.—Pittsburg, etc., R. Co. v. Devinney, 17 Ohio St. 197. Pittsburgh, etc., R. Co. v. Lewis, 33 Ohio St. 196; Pittsburgh, etc., R. Co. v. Ranney, 37 Ohio St. 665, 5 Am. & Eng. R. Cas. 533.

Pennsylvania.—Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432.

Texas.—Houston, etc., R. Co. v. Willie, 53 Tex. 318; Hamilton v. Galveston, etc., R. Co., 54 Tex. 556; Houston, etc., R. Co. v. Myers, 55 Tex. 110, 8 Am. & Eng. R. Cas. 114; Houston, etc., R. Co. v. Gilmore, 62 Tex. 391; Texas, etc., R. Co. v. Berry, 67 Tex. 238, 31 Am. & Eng. R. Cas. 147.

English.—Wilson v. Merry, L. R. 1 H. L. Sc. App. 326; Charles v. Taylor, 3 C. P. Div. 492; Barton's Hill Coal Co. v. Reid, 3 Macq. 266; Barton's Hill Coal Co. v. McGuire, 3 Macq. 300; Morgan v. Vale of Neath R. Co., 5 B. & S. 570, 117 E. C. L. 570, L. R. 1 C. P. 291; Hutchinson v. York, etc., R. Co., 5 Ex. 343; Conway v. Belfast, etc., R. Co., Ir. 9 C. L. 498.

Under the rules of a company, where a train parted and the conductor was on the rear portion, the engineer became the conductor of the forward portion; and after a train had parted the conductor sent a brakeman from the rear portion to signal the forward portion. *Held*, that he was a fellow servant with the engineer while acting as conductor, and could not recover from the company for the engineer's negligence. Newport News, etc., R. Co. v. Howe, 52 Fed. Rep. 362. Following Randall v. Baltimore, etc., R. Co., 109 U. S. 478, 15 Am. & Eng. R. Cas. 243; Baltimore, etc., R. Co. v. Andrews, 50 Fed. Rep. 728. Referring to Little Miami R. Co. v. Ste-

vens, 20 Ohio 415; Cleveland, etc., R. Co. v. Keary, 3 Ohio St. 201; Chicago, etc., R. Co. v. Ross, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501.

A brakeman in a switch gang is a fellow servant with the engineer in charge of the switch engine. Warmington v. Atchison, etc., R. Co., 46 Mo. App. 159.

Coupling.—In East Tennessee, etc., R. Co. v. Smith, 89 Tenn. 114, 44 Am. & Eng. R. Cas. 596, the injured employee was a brakeman and was hurt while undertaking to couple a moving train. He alleged that he was ordered to make the coupling by the engineer. The train was in charge of the conductor. *Held*, that the engineer and brakeman were fellow servants, and that the company was not responsible for the negligence of either, by which the other was injured, there being no proof of the incompetency of either employee.

In South Florida R. Co. v. Price, 32 Fla. 46, it was held that the engineer, fireman, and brakeman of the same freight train were fellow servants; and that prior to the passage of chapter 3744, Laws, approved June 7, 1887, the employer company was not liable in damages to one of such fellow servants for injuries sustained in the line of his employment in consequence of the negligence of the engineer in putting his unskilled or careless fireman to the performance of his duty in temporarily handling the engine. Parrish v. Pensacola, etc., R. Co., 28 Fla. 251, and South Florida R. Co. v. Weese, 32 Fla. 212, cited and approved.

Insufficient Complaint.—In Hagins v. Cape Fear, etc., R. Co., 106 N. Car. 537, 44 Am. & Eng. R. Cas. 595, the plaintiff was a brakeman and was injured by the negligence of the engineer in charge of the locomotive. In an action for such injury, the complaint simply set out the fact of the injury without any allegation of the facts to take the case out of the law of co-service. *Held*, that the brakeman and the engineer were fellow servants, and that the complaint did not state facts sufficient to constitute a cause of action.

A brakeman injured through the negligence of a locomotive engineer is his fellow servant, and in an action for such injury, where the complaint contains no allegation that the company exposed the plaintiff to unusual and unnecessary risks, and that, knowing that the engineer was unfit and incapable, they retained him in their service, a demurrer to such complaint should be sustained. Hobbs v. Atlantic, etc., R. Co., 107 N. Car. 1, 44 Am. & Eng. R. Cas. 592.

Employees of Different Companies.—While a coal train of defendant railroad company, whose tracks ran over the docks of a coal company, was delivering coal to the latter company, a brakeman of the coal company, engaged in coupling cars of the train, was injured by the negligence of defendant's engineer. *Held*, that such engineer was not a fellow employee of the injured brakeman, he not being under the power and direction of the coal company, engaged exclusively in doing its work or "lent" to it for the occasion. Central R. of New Jersey v. Stoermer, 51 Fed. Rep. 518, 53 Am. & Eng. R. Cas. 577.

II. Fellow Servant of Brakeman on Another Train.—An engineer on one train of a corporation is a fellow servant of a brakeman working the switch for another train of the same company on an adjacent track. *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243.

The conductor and engineer of one train, whose negligence causes a collision resulting in the death of a brakeman on another train, are fellow servants of such brakeman. *Baltimore, etc., R. Co. v. Andrews*, 53 Am. & Eng. R. Cas. 523, 50 Fed. Rep. 728. Distinguishing *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 24 Am. & Eng. R. Cas. 407; *Hough v. Texas, etc., R. Co.*, 100 U. S. 217; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 11 Am. & Eng. R. Cas. 254; *Quebec Steamship Co. v. Merchant*, 133 U. S. 375; *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 47 Am. & Eng. R. Cas. 406. Following *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243. Quoting *Pittsburg, etc., R. Co. v. Devinney*, 17 Ohio St. 198. Distinguished in *Cincinnati, etc., R. Co. v. Clark*, 57 Fed. Rep. 125. Followed in *Newport News, etc., R. Co. v. Howe*, 52 Fed. Rep. 362.

Engineers and brakemen are held to be in the same class or line of service; and the fact that the engineer served on a passenger and the brakeman on a freight train does not affect the reason and policy of implying, as between themselves, such association, knowledge, and trust as to have induced an undertaking mutually to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert. *Louisville, etc., R. Co. v. Robinson*, 4 Bush (Ky.) 507.

An engineer on a moving passenger train, and a brakeman on a freight train of the same company, at a depot, who is ordered by the conductor of his train to go along the line of the road to display danger signals to the passenger train, are fellow servants for the purpose of bringing the train safely into the depot. *East Tennessee, etc., R. Co. v. Rush*, 15 Lea (Tenn.) 145, 25 Am. & Eng. R. Cas. 502. Reviewing *Nashville, etc., R. Co. v. Wheless*, 10 Lea (Tenn.) 741, 15 Am. & Eng. R. Cas. 315; *East Tennessee, etc., R. Co. v. Gurley*, 12 Lea (Tenn.) 46, 17 Am. & Eng. R. Cas. 568.

III. Whether an Engineer is the Superior of a Brakeman.—Even in some states which adhere to the rule that where the master places one servant in a position of subordination to another servant, and the subordinate servant, without fault, is injured through the negligence of the superior servant, the master is liable, it is held that the engineer cannot, under ordinary circumstances, be considered as superior to the brakeman. *Pittsburg, etc., R. Co. v. Lewis*, 33 Ohio St. 196; *Pittsburg, etc., R. Co. v. Ranney*, 37 Ohio St. 665, 5 Am. & Eng. R. Cas. 533; *Pittsburg, etc., R. Co. v. Devinney*, 17 Ohio St. 197; *Nashville, etc., R. Co. v. Wheless*, 10 Lea (Tenn.) 741, 15 Am. & Eng. R. Cas. 315; *East Tennessee R. Co. v. Rush*, 15 Lea (Tenn.) 145, 25 Am. & Eng. R. Cas. 502.

There was no proof that a brakeman was subordinate to an engineer on the same train except a rule of the company requiring the engineer to give certain signals as a notice to apply or loosen the brakes, and requiring the brakeman to manage the brakes "according to circumstances, and the signals of the engineer," and placing the brakeman while on the train in subordination to the conductor. *Held*, not sufficient to show the relation of superior and subordinate servant, and that they were fellow servants. Pittsburgh, etc., R. Co. v. Lewis, 33 Ohio St. 196.

Tennessee Doctrine.—In East Tennessee, etc., R. Co. v. Collins, 85 Tenn. 227, the court lays down the doctrine as established in Tennessee by the case of Nashville, etc., R. Co. v. Wheelless, 10 Lea (Tenn.) 741, 15 Am. & Eng. R. Cas. 315, as follows: "The case is not only not authority for such position, but is directly contrary. The facts in that case were that the conductor, who was in the control of the train, and who was the common superior of both the engineer and the brakeman, had given orders that the train be coupled up, and gone into the depot to attend to other business. In obeying his orders the engineer and brakeman were acting when the accident occurred, and they were clearly fellow servants, at that time engaged in a common employment, under a common superior, and the company not liable to either for injury occasioned by the negligence of the other. But it is expressly said in that case (and the reasoning and obvious propriety of the rule makes the expression unnecessary) that 'of course, in some cases, a railroad company may be held liable to a brakeman for the negligence of an engineer, as where the former is, *in fact*, acting under the orders of the latter. We do not mean to hold that the relation of superior or inferior *may not*, in some cases, exist between them—only that it *did not*, in this case, so far as the record shows.' Upon its facts the Wheelless case was manifestly right, and to the facts of this case it clearly has no application. The engineer was in charge of the train and all the servants upon it. Whatever they did was under his orders, and he was the superior of plaintiff, as averred." See, also, Nashville, etc., R. Co. v. Handman, 13 Lea (Tenn.) 423; Bradley v. Nashville, etc., R. Co., 14 Lea (Tenn.) 374; East Tennessee, etc., R. Co. v. Rush, 15 Lea (Tenn.) 145, 25 Am. & Eng. R. Cas. 502; Louisville, etc., R. Co. v. Kenley, 92 Tenn. 207, 59 Am. & Eng. R. Cas. 183.

An engineer is fellow servant, not the superior, of a brakeman on his train, where, being deprived of their conductor, both pursue, independently of each other, the duties prescribed by the rules of the company in such emergency—the engineer not, in fact, assuming any control over the brakeman, though having the right to do so. Louisville, etc., R. Co. v. Martin, 87 Tenn. 398.

Kentucky.—"The engineer and brakeman on the same train," say the supreme court of Kentucky in Louisville, etc. R. Co. v. Brooks, 83 Ky., 129, "are not, as assumed by counsel, co-equals; for the latter has no right to resist the former, when acting in his appointed sphere, but is bound to implicitly obey his signals; and, as between

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them, there is no reason or consideration of policy to imply, on the part of the brakeman, an undertaking to look to the engineer alone, and not to the company, for security against his wilful neglect, even conceding such should be the rule as between co-equals. In our opinion, therefore, appellee has a right to maintain this action for the cause stated in his petition."

An Engineer who puts a Fireman in Charge of an engine is a vice principal of, and not a fellow servant of, a brakeman coupling the engine to another engine. *Brown v. Southern Pac. Co.*, 7 Utah 288.

Notice to an Engineer of Defects in wheels which throw the train from the track and kill a brakeman is not notice to the brakeman; and the doctrine of fellow service does not apply where the accident was not due to the negligence of the former running in the train. *Illinois Cent. R. Co. v. Pirtle*, 47 Ill. App. 498.

INTERSTATE COMMERCE COMMISSION

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAIL-
WAY CO. *et al.* *

(Circuit Court S. D. Ohio, Oct. 8, 1896.)

1. The Right to Prescribe Maximum Rates for the Transportation of Freight.—The right to prescribe maximum rates for the transportation of freight is the right to dictate an indispensable and one of the most important terms of the contract between the carrier and the shipper.

2. Same.—As a legislative right it has been so long and so generally recognized as to be beyond question; and it results from the corporate existence of the common carrier, or from his *quasi* public relation to any and all who may come to him as freighters or passengers.

3. Same.—It can hardly be said to be within the recognized limits of the exercise of judicial right or power, because while a court of equity may enforce specific performance of a contract, or correct mutual mistakes in it, it never makes a contract.

4. The Interstate Commerce Commission.—The Interstate Commerce Commission is not invested, and cannot be invested, under the constitution, with either legislative power or purely judicial power. Its functions are necessarily restricted to the performance of administrative duties, with such *quasi* judicial powers as are incidental and necessary to the proper performance of those duties.

5. Same—Right of the Commission to Fix Rates.—It is not an incidental right. It is not a right or power to be derived by implication or construction from general phrases in the first or other sections of the act to regulate commerce, nor can it be imported into the act by reference to or by reason of the necessities of the case. If found at all, it must be

* See *Cincinnati & C. R. Co. v. Interstate Commerce Commission*, p. 223.

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found in express and specific language, among the powers and rights granted in direct terms, and there is no such language in the act.

6. Same—Same.—The power of the commission to fix rates was denied by the supreme court in the Cincinnati, New Orleans & Texas Pacific Railway Co. v. The Interstate Commerce Commission, 162 U. S. 196.

7. The Act to Regulate Commerce.—Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.

8. Cases Cited.—Cinn., N. O. & Tex. Pac. Ry. Co. v. I. C. C., 162 U. S. 184-197; Texas Pacific Ry. Co. v. I. C. C., 162 U. S. 197-255; I. C. C. v. L. & N. R. R. Co., 73 Fed. Rep. 409-429; I. C. C. v. N. E. R. R. Co., 74 Fed. Rep. 70-73; I. C. C. v. Alabama Midland Ry. Co. *et al.*, 69 Fed. Rep. 227-233, 74 Fed. Rep. 715-733; I. C. C. v. Lehigh Valley R. Co., 74 Fed. Rep. 784-788.*

George F. Edmunds and Harland Cleveland, for petitioner.
Edward Colston and Ed. Baxter, for defendants.

HON. GEO. R. SAGE delivered the opinion of the court.

The right of the Interstate Commerce Commission to prescribe maximum rates for the transportation of freight was assumed by the commission, is contended for by their counsel, and is essential to their case. It is the right to dictate an indispensable and one of the most important terms of the contract between the carrier and the shipper. As a legislative right, so long and so generally recognized as to be beyond question, it results from the corporate existence of the common carrier, or from his *quasi* public relation to any and all who may come to him as freighters or passengers, and it is generally limited to fixing maximum rates, although doubtless it might be extended to include—what is probably as important—minimum rates. It can hardly be said to be within the recognized limits of the exercise of judicial right or power, because while a court of equity may enforce specific performance of a contract, or rescind it, or correct mutual mistakes in it, it never makes a contract. The Interstate Commerce Commission is not invested, and cannot be invested, under

* Head notes approved by Judge SAGE.

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the constitution, with either legislative power or purely judicial power. Its functions are necessarily restricted to the performance of administrative duties, with such *quasi* judicial powers as are incidental and necessary to the proper performance of those duties. This is a proposition which does not in the slightest depend upon the eminence, morally, socially, intellectually, or officially, of the individual members of the commission, which was emphasized in the argument. The right claimed is not an incidental right. It is not a right or power to be derived by implication or by construction from general phrases in the first or other sections of the act, nor can it be imported into the act by reference to or by reason of the necessities of the case. If found at all, it must be found in express and specific language, among the powers and rights granted in direct terms, and there is no such language in the act.

The power of the commission to fix rates was denied by the supreme court in the Cincinnati, New Orleans & Texas Pacific Railway Co. v. The Interstate Commerce Commission, 162 U. S. 196, known as the Social Circle Case. The supreme court there declared:

"Whether congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below, and is discussed in the briefs of counsel.

"We do not find any provision of the act that expressly or by necessary implication confers such a power."

"It was argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable."

Upon the expression in the first paragraph quoted above "the power to itself fix rates," and the expression "itself fixes a rate" in the last paragraph quoted, counsel for the commission contend that the supreme court had in mind the exercise by the commission of a power to fix or prescribe rates in advance of "issue made and a finding of the facts," or, in other words,—as said by the supreme court in Texas &

Interstate Commerce Commission v. Cinc., N. O. & T. P. R. Co.

Pacific Railway Co. v. Interstate Commerce Commission, 162 U. S. 197, known as the "Import Case,"—a power to do so of its own motion and without a hearing of the parties to be affected. What the supreme court considered in the Import Case was the order of the commission that the inland rate on certain foreign traffic should not be less than the rate on domestic traffic of the same kind, and as that was then 288 cents per 100 pounds, counsel claimed that the order fixed the rate for the time being at 288 cents. They, however, ignore the distinction that there the order in effect only provided that there should be no discrimination in rates against domestic traffic, leaving the railway company at perfect liberty to change rates at pleasure, provided that if there should be a lowering of rates for the foreign freight there should be a corresponding reduction as to the domestic freight and *vice versa*; while here a fixed maximum rate was prescribed which could be exceeded only upon subsequent order by the commission. The contention based upon the use by the supreme court of the phrase already quoted is too narrow and technical. That no such limitation upon its opinion was intended is made perfectly plain by the concluding paragraphs, which are immediately after the paragraphs above quoted, and are as follows:

"We prefer to adopt the view expressed by the late Justice JACKSON, when circuit judge, in the case of the *Interstate Commerce Commission v. Baltimore & Ohio Railroad Co.*, 43 Fed. Rep. 37, and whose judgment was affirmed by this court (145 U. S. 263).

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

This construction of the law has been followed by Judge CLARK in *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 73 Fed. Rep. 409; by Judge ACHESON

The Shinkle, Wilson & Kreis Co. v. Louisville & Nashville R. R. Co.

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This court adopts the language of Judge ACHESON in Interstate Commerce Commission and Lehigh Valley R. R. Co., cited above:

“ Those views of the supreme court decisively show that the Interstate Commerce Commission is not clothed with the power to fix rates which it undertook to exercise in this case.”

The Social Circle Case being decisive and controlling, it is not necessary nor would it be profitable to enter upon the discussion whether the rates fixed by the commission are reasonable.

The petition will be dismissed with costs.

THE SHINKLE, WILSON & KREIS CO. *et al.*

v.

LOUISVILLE & NASHVILLE R. R. CO. *et al.*

(*United States Circuit Court, Southern District of Ohio, Western Division.*)

THIS case involves precisely the questions and considerations disposed of in Interstate Commerce Commission v. The Cincinnati, New Orleans & Texas Pacific Railway Co. *et al.*, and the decree will be in accordance with the opinion in that case.

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- Plaintiff emerged from an alleyway, driving his team into an open street upon which defendant ran its car. Immediately after leaving the alley he looked in the direction from which the car came, and, in consequence of trees and poles, saw none, and then approached the track. Before crossing it he made no particular effort to see whether a car was coming, and it was possible that the poles might have obstructed the

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- view between him and the car. The car was running at the rate of 25 or 30 miles an hour, and no gong was sounded until just before the collision occurred, in which plaintiff was injured. *Held*, that a nonsuit was improperly granted. *Hall v. Ogden City St. Ry. Co. (Utah)*, 77.
- Reckless act not justified by fact that others have performed it. *Wherry v. Duluth, M. & N. Ry. Co. (Minn.)*, 72.
- Respective rights of the public and street railway companies at intersecting streets. *Richmond R., etc., Co. v. Garthright (Va.)*, 263.
- Right conferred upon railroad to cross street does not confer exclusive use of crossing. *Chicago, B. & Q. R. Co. v. Beatrice Rapid Transit & Power Co. (Neb.)*, 325.
- Right of railroad to cross track of another company, 418.
- Right of way. Owner's right to crossing. *Hamlin v. New York, N. H. & H. R. Co. (Mass.)*, 546.
- Right to cross tracks of another company. *Crescent City R. Co. v. New Orleans & C. R. Co. (La.)*, 418.
- Rule as to vigilance and care to be exercised in cities. *English v. Southern Pac. Co. (Utah)*, 63.
- Stop, look, and listen. *Sullivan v. New York, etc., R. Co. (Pa.)*, 260; *Seamans v. Delaware, etc., R. Co. (Pa.)*, 260.
- Street railroad crossings. Negligence. *Consolidated Traction Co. v. Scott (N. J.)*, 371.
- Subjecting vehicle to unreasonable delay. *Wilson v. Southern Pac. Co. (Utah)*, 40.
- The plaintiff approached a street crossing and found it blocked by a freight train. It was apparent that the train was liable to start at any moment. After waiting at least 20 minutes plaintiff attempted to cross by climbing up between the cars, some 250 feet from the engine, and was injured by the sudden backing up of the train, no signal or warning having been given. *Held*, that plaintiff was guilty of contributory negligence as a matter of law. *Wherry v. Duluth, M. & N. Ry. Co. (Minn.)*, 72.
- Train and vehicle approaching railroad crossing at same time. *Wilson v. Southern Pac. R. Co. (Utah)*, 40.
- Violation of a statute requiring railroad trains to be stopped at least fifty feet before getting to a crossing of another track is not excused by the fact that both railroads are leased and operated by the same company. *Chesapeake, etc., R. Co. v. Com. (Ky.)*, 260.
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- Fires caused by railroads. Measure of damages. *Kansas City & O. R. Co. v. Rogers (Neb.)*, 617.

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A general servant of one person may, for a particular work or occasion, become *pro hac vice* the servant of another person, so that the latter will not be liable to him for an injury occasioned by the negligence of other servants engaged with him in a common employment. *Delaware, L. & W. R. Co. v. Hardy* (N. J.), 577.

Brakemen on the same train are fellow servants. *Young v. West Virginia C. & P. Ry. Co.* (W. Va.), 134.

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- Presumption of negligence. *Chicago, B. & Q. R. Co. v. Hague* (Neb.), 476.
- In an action for personal injuries, proof that the plaintiff was a passenger, that the accident happened, and that the injury was inflicted is *prima facie* evidence of negligence. *New York, C. & St. Louis R. Co. v. Blumenthal* (Ill.), 174.
- Presumption of negligence where passenger is injured from the management and operation of the railroad. *Fremont, E. & M. V. R. Co. v. French* (Neb.), 365.
- Question of law and fact. *McCann v. Newark & S. O. Ry. Co.* (N. J.), 382; *New York, C. & St. Louis R. Co.* (Ill.), 174; *Omaha Street Ry. Co. v. Martin* (Neb.), 1; *Saunders v. Southern Pac. Co.* (Utah), 14.
- Rate of speed not negligence *per se.* *Omaha & R. V. R. Co. v. Krayenbuhl* (Neb.), 5.
- Running street car at excessive rate of speed. *Harper v. Philadelphia Traction Co.* (Pa.), 257.
- Selecting the more dangerous of two avenues of travel. *Settoon v. Texas & Pac. R. Co.* (La.), 219.
- Selecting the more dangerous of two possible ways of doing an act. *George v. Mobile, etc., R. Co.* (Ala.), 257.
- Street railway company not liable for negligence of independent contractor. *Sanford v. Pawtucket Street Ry. Co.* (R. I.), 318.
- Use of uneven couplings or dead-woods on freight cars. *Pennsylvania Co. v. Ebaugh* (Ind.), 200.
- Variance between pleading and proof. *Coulter v. Great Northern Ry. Co.* (N. Dak.), 336.
- Violation of statute requiring gates on elevated trains to be closed is negligence. *Graham v. Manhattan R. Co.* (N. Y.), 256.
- Where the testimony tended to show that the electric car of defendant was run at the rate of about 20 miles an hour at the time of the accident, much faster than was allowable under the city ordinances, and that no gong was sounded and no bell rung, and it was quite possible that, had the car been run at its usual legal rate of speed, and the bell rung and the gong sounded, as should have been done, the accident would not have happened, and where it was also quite possible that, had the plaintiff observed that degree of ordinary care and caution which would be expected of an ordinarily prudent man under like circumstances, the accident would not have happened, still the court held that it was for the jury to pass upon the testimony, and determine from it the question of the negligence of the street car company, under the circumstances of this case, and it was error for the trial court to grant a motion for a nonsuit. *Dederichs v. Salt Lake City R. Co.* (Utah), 258.

NEGLIGENCE—Continued.

Whether it is negligence *per se* to exceed speed permitted by the ordinance of a city. *Hall v. Ogden City St. Ry. Co. (Utah)*, 77.

NERVOUS SHOCK. See CARRIERS OF PASSENGERS.

NONSUIT.

Where the testimony tended to show that the electric car of defendant was run at the rate of about 20 miles an hour at the time of the accident, much faster than was allowable under the city ordinances, and that no gong was sounded and no bell rung, and it was quite possible that, had the car been run at its usual legal rate of speed, and the bell rung and gong sounded, as should have been done, the accident would not have happened, and where it was also quite possible that, had the plaintiff observed that degree of ordinary care and caution which would be expected of an ordinarily prudent man under like circumstances, the accident would not have happened, still the court held that it was for the jury to pass upon the testimony, and determine from it the question of the negligence of the street car company, under the circumstances of this case, and it was error for the trial court to grant a motion for a nonsuit. *Dederichs v. Salt Lake City R. Co. (Utah)*, 258.

OFFICERS AND AGENTS OF CORPORATIONS.

Notice of defective appliances in action against corporation. *Bland v. Shreveport Belt Ry. Co. (La.)*, 349.

ORDINANCES. See ORDINARY RAILROADS IN STREETS; STREET RAILROADS.

ORDINARY RAILROADS IN STREETS.

Injunction against the occupation of a street by an ordinary railroad, 271.
Injunction against laying additional track. *Varwig v. Cleveland, C., C. & St. L. R. Co. (Ohio)*, 266.

Interference with abutting property by railroad located in street. *Louisville, etc., R. Co. v. Hooe (Ky.)*, 264.

Right conferred upon railroad to cross street does not confer exclusive use of crossing. *Chicago, B. & Q. R. Co. v. Beatrice Rapid Transit & Power Co. (Neb.)*, 325.

Violation of city ordinance in running engine at too great rate of speed. *St. Louis, etc., R. Co. v. Eggmann (Ill.)*, 263.

Where a railroad company has acquired a permanent easement in the streets of a city by an ordinance, it is not entitled to compensation from a street railroad as a condition to the crossing of its tracks by the latter. *Chicago, B. & Q. R. Co. v. Beatrice Rapid Transit & Power Co. (Neb.)*, 325.

Where, prior to the purchase of land abutting upon a village street, a railway company has, with the consent of the owner of such land, laid in the street in front of the premises purchased a single track of its road, and is operating cars thereon, such condition is notice to the purchaser of a right to maintain such track, and his easement in the street as owner of abutting land is, to the extent of such possession and user, affected thereby. But such right will not be affected by an unrecorded deed from his grantor, executed more than six months prior, giving to the company permission to lay additional tracks, if, at the time of his purchase, the purchaser acts in good faith, and has no knowledge of the existence of such conveyance. *Varwig v. Cleveland, C., C. & St. L. R. Co. (Ohio)*, 265.

PARENT AND CHILD.

Liability of railroad knowingly engaging an employee under age against the consent of his parents, for injuries to such employee. *Taylor v. Chesapeake & O. Ry. Co.* (W. Va.), 115.

Right of action for loss of child's services. *Taylor v. Chesapeake & O. Ry. Co.* (W. Va.), 115.

Right of father to services of child. *Taylor v. Chesapeake & O. Ry. Co.* (W. Va.), 115.

PARTIES TO ACTION.

Waiver to objection to improper party defendant. *St. Louis, K. & S. R. Co. v. Wear et al.* (Mo.), 623.

PASSENGERS. See CARRIERS OF PASSENGERS.**PENAL STATUTES.**

A penal statute imposing a fine upon railroads for charging more than a just and reasonable rate for the transportation of passengers and freight is void for uncertainty in failing to prescribe a standard as to what is just and reasonable. *Louisville & N. R. Co. v. Commonwealth* (Ky.), 193.

PERSONAL INJURIES. See CROSSINGS; DAMAGES; EVIDENCE; NEGLIGENCE.**PHYSICIANS AND SURGEONS.** See MEDICAL ATTENDANCE.**PLATFORM.** See CARRIERS OF PASSENGERS.**PLEADING.**

Allegation of negligence. *Omaha & R. V. Ry. Co. v. Wright* (Neb.), 9.

Issue not raised by pleading. *Omaha & R. V. Ry. Co. v. Wright* (Neb.), 9.

Negligence. *Omaha & R. V. Ry. Co. v. Wright* (Neb.), 9.

Variance between pleading and proof. *Coulter v. Great Northern Ry. Co.* (N. Dak.), 336.

PLEDGE.

The shipper of goods consigned them to himself, and received a bill of lading from the railway company accordingly. The railway company delivered them with a proper way-bill to the next connecting railway company, who, at the shipper's request, delivered the goods to him in transit at an intermediate point, without the surrender or cancellation of the bill of lading, which he thereafter, and before the goods would have arrived at their original destination if the transit had continued, pledged, in the usual course of business, to an innocent pledgee for value. *Held*, the latter railway company is liable to the pledgee for failure to deliver the goods at the place of destination, and is estopped from showing such intermediate delivery to the shipper. *Ratzer v. Burlington, C. R. & N. Ry. Co.* (Minn.), 55.

POWER OF COURT.

When an order of court has been issued without jurisdiction, refusal to obey does not render the person refusing liable for contempt. *St. Louis, K. & S. R. Co. v. Wear*, Judge (Mo.), 583.

PRESUMPTION. See NEGLIGENCE.

Carriers of goods. Presumption as to ownership of goods delivered conditionally. *Louisville & N. R. Co. v. Hartwell* (Ky.), 550.

Negligence. In an action for personal injuries, proof that the plaintiff was a passenger, that the accident happened, and that the injury was inflicted is *prima facie* evidence of negligence. *New York, C. & St. Louis R. Co. v. Blumenthal* (Ill.), 174.

PRIORITIES.

Priority between railroad mortgage and judgment for a tort committed after the execution of the mortgage. *Green v. Coast Line R. Co. (Ga.)*, 150, 178.

PROHIBITION.

Defect of jurisdiction. *St. Louis, K. & S. R. Co. v. Wear, Judge (Mo.)*, 583.

When writ of prohibition will lie. *St. Louis, K. & S. R. Co. v. Wear, Judge (Mo.)*, 583.

PROXIMATE CAUSE.

Care to be exercised. *Davis v. Chicago, M. & St. P. R. Co. (Wis.)*, 622.

Duty of engineer towards hand car in front of him. *Nelling v. Chicago, St. P. & K. C. R. Co. (Iowa)*, 539, 542.

Negligence in giving signals. *Wragge v. South Carolina & G. R. Co. (S. Car.)*, 639.

Questions of law and fact. *Hall v. Ogden City St. Ry. Co. (Utah)*, 78; *McCann v. Newark & S. O. Ry. Co. (N. J.)*, 382.

PUBLIC LANDS.

Rights of third parties. *Missouri, K. & T. R. Co. v. Cook (U. S.)*, 552.

State taxation of lands granted by congress to railroads. *Central Pac. R. Co. v. Nevada (U. S.)*, 264.

PUNITIVE DAMAGES. See EXEMPLARY DAMAGES.

PURCHASE. See SALES.

PURCHASE OF RAILROAD.

Liability of purchaser in tort or contract, 575.

QUESTIONS OF LAW AND FACT.

Alighting from moving train. *Northern Pac. R. Co. v. Egeland (U. S.)*, 259.

As to whose negligence was the proximate cause of the accident. *Hall v. Ogden City St. Ry. Co. (Utah)*, 78.

Boarding or alighting from a moving car, 246, 254.

Cause of nervous shock where passenger is expelled from train a question for the jury. *Sloane v. Southern California Railway Co. (Cal.)*, 182.

Contributory negligence. *McCann v. Newark & S. O. Ry. Co. (N. J.)*, 382; *Pomponio v. New York, etc., R. Co. (Conn.)*, 259.

Credibility of witnesses for the jury. *Fremont, E. & M. V. R. Co. v. French (Neb.)*, 365.

Degree of care question for jury. *Consolidated Traction Co. v. Scott (N. J.)*, 372.

Distance that hand cars running on same track should be kept apart. *Atchison, T. & S. F. R. Co. v. Chance (Kan.)*, 328.

Jury may not disregard instructions. *Fisher v. West Virginia & P. R. Co. (W. Va.)*, 86.

Negligence. *McCann v. Newark & S. O. Ry. Co. (N. J.)*, 382; *New York, C. & St. Louis R. Co. v. Blumenthal (Ill.)*, 174; *Omaha Street Ry. Co. v. Martin (Neb.)*, 1; *Saunders v. Southern Pac. Co. (Utah)*, 14.

Negligence in not stationing flagman at crossing. *Huntress v. Boston, etc., R. Co. (N. H.)*, 257.

Proximate cause. *Hall v. Ogden City St. Ry. Co. (Utah)*, 78; *McCann v. Newark & S. O. Ry. Co. (N. J.)*, 382.

Whether boarding a moving electric car is negligence a question of fact. *Cicero & Proviso St. R. Co. v. Meixner (Ill.)*, 246, 254.

RAILROADS.

- Care required of railroads. *Gulf, C. & S. F. R. Co. v. Warlick* (Ind. Ter.), 32.
Duty of railroad company to avoid injury to stock. *Kirk v. Norfolk & W. R. Co.* (W. Va.), 105.
Primary duty of railroad company is to its passengers and freight. *Kirk v. Norfolk & W. R. Co.* (W. Va.), 106.
Service of process on ticket agent at union depot. *Hillary v. Great Northern R. Co.* (Minn.), 51.

RAILROAD SECURITIES.

- Priority between railroad mortgage and judgment for a tort committed after the execution of the mortgage. *Green v. Coast Line R. Co.* (Ga.), 150, 173.

RECEIVER.

- Compensation when appointed under unauthorized order. *St. Louis, K. & S. R. Co. v. Wear et al.* (Mo.), 623.
Manager of a railroad cannot be appointed receiver of a second railroad. *St. Louis, K. & S. R. Co. v. Wear, Judge* (Mo.), 584.
Power of judge to appoint receiver outside of county in which cause is pending. *St. Louis, K. & S. R. Co. v. Wear, Judge* (Mo.), 583.
Power of receiver appointed by foreign court to replevy property. *Robertson v. Stead* (Mo.), 520.
Power of receivers in *ex parte* proceedings. *St. Louis, K. & S. R. Co. v. Wear, Judge* (Mo.), 583.
Priority between railroad mortgage and judgment for a tort committed after the execution of the mortgage. *Green v. Coast Line R. Co.* (Ga.), 150, 173.

RELEASE.

- Claim for damages by employee. *Chesapeake & Ohio R. Co. v. Mosby* (Va.), 633.
Validity of stipulation for employment in release for damages. *Chesapeake & Ohio R. Co. v. Mosby* (Va.), 633.

REPLEVIN.

- Power of receiver appointed by foreign court to replevy property. *Robertson v. Stead* (Mo.), 520.

RES GESTÆ.

- Plaintiff immediately after his injury walked across the track and said to the switchman, "Who is to blame for this?" who answered: "It was the engineer; I told him to stop and you to cross." *Held*, admissible as *res gestæ*. *Wilson v. Southern Pac. Co.* (Utah), 40.

RIGHT OF WAY.

- Fences. *Chicago, etc., R. Co. v. Woodworth* (Ind. Ter.), 261.
New location to right of way does not extinguish crossing. *Hamlin v. New York, N. H. & H. R. Co.* (Mass.), 546.
Right of landowner to crossing. *Hamlin v. New York, N. H. & H. R. Co.* (Mass.), 546.

SALE OF RAILROAD.

- Liability of purchaser in tort or contract, 575.

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- Liability of purchasing railroad for tort committed prior to transfer by purchased railroad. *Pennison v. Chicago, M. & St. P. R. Co.* (Wis.), 573.

SCHOOLS.

Taxation of railroads for school purposes. New York, etc., R. Co. v. Board of Supervisors (Va.), 265.

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Jurisdiction of court of claims in respect to railroad property seized by government during war. United States v. Winchester, etc., R. Co. (U. S.), 264.

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Plessy v. Ferguson. Plessy v. Ferguson (U. S.), 277.

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SPECIFIC PERFORMANCE.

Specific performance of contract to supply electric power to street railroad. Electric Lighting Co. v. Mobile, etc., R. Co. (Ala.), 265.

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A penal statute imposing a fine upon railroads for charging more than a just and reasonable rate for the transportation of passengers and freight is void for uncertainty in failing to prescribe a standard as to what is just and reasonable. Louisville & N. R. Co. v. Commonwealth (Ky.), 193.

Construction of statute. Wragge v. South Carolina & G. R. Co. (S. Car.), 639.

Jurisdiction of supreme court in construction of state statute. Illinois Cent. R. Co. v. State of Illinois (U. S.), 354.

State statute operating to delay interstate commerce. Illinois Central R. Co. v. State of Illinois (U. S.), 354.

State statute unnecessarily interfering with the carriage of mails. Illinois Cent. R. Co. v. State of Illinois (U. S.), 354.

STOCK. See CARRIERS OF LIVE STOCK.

Duty of railroad company in respect to stock is subordinate to the duty they owe to their passengers. Kirk v. Norfolk & W. R. Co. (W. Va.), 106.

Fencing right of way. Chicago, etc., R. Co. v. Woodworth (Ind. Ter.), 261.

Injury to cattle at railroad crossing. Bunnell v. Rio Grande, etc., R. Co. (Utah), 261.

Jurisdiction of justices of the peace in stock killing cases not exclusive. Kansas City, etc., R. Co. v. Whitehead (Ala.), 262.

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Liability for killing stock where engineer and fireman were keeping a proper lookout. *Lovejoy v. Chesapeake, etc., R. Co.* (W. Va.), 261.

Liability of railroad company for using salt on switches where it has a tendency to lure stock on the track. *Kirk v. Norfolk & W. R. Co.* (W. Va.), 106.

Primary duty of railroad company is to its passengers and freight. *Kirk v. Norfolk & W. R. Co.* (W. Va.), 106.

Statute of limitations in stock killing cases. *Kansas City, etc., R. Co. v. Whitehead* (Ala.), 262.

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Goods held for payment of freight and charges. *Jeffris v. Fitchburg R. Co.* (Wis.), 609.

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STREET CARS.

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STREET RAILROADS. See ELEVATED RAILROADS; ORDINARY RAILROADS IN STREETS.

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Alighting from moving street car. *Boikens v. New Orleans, etc., R. Co.* (La.), 260.

Assumption of risk. Conductor of street railway voluntarily remaining in employ of company when he knows that the cars are not provided with life guards. *Denver Tramway Co. v. Nesbit* (Colo.), 605.

Attempt to cross in front of moving street car. *O'Connell v. St. Paul City R. Co.* (Minn.), 60.

Boarding an electric car in motion. *Cicero & Proviso St. R. Co. v. Meixner* (Ill.), 246.

Care required of persons traveling in public street. *Hall v. Ogden City St. Ry. Co.* (Utah), 78.

Care to be observed by electric railroad. *Consolidated Traction Co. v. Scott* (N. J.), 371.

Change of motive power. *Potter v. Scranton Traction Co.* (Pa.), 307.

Change of motive power does not *per se* create additional easement. *State v. Trenton Pass. Ry. Co.* (N. J.), 392.

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Consent of municipality to the laying of a street railroad is not the consent for the laying of two distinct railroads. *West Jersey Traction Co. v. Camden Horse R. Co.* (N. J.), 520.

Consent to laying of street railroads must be given at corporate meeting. *West Jersey Traction Co. v. Camden Horse R. Co.* (N. J.), 520.

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- Construction of charter of street railway. *West Jersey Traction Co. v. Camden Horse R. Co. (N. J.)*, 520.
- Duty of motorman to keep a lookout. *Hall v. Ogden City St. Ry. Co. (Utah)*, 77.
- Duty of railroad company to avail itself of new inventions. *Richmond, etc., R. Co. v. Garthright (Va.)*, 264.
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- Liability for damages caused by change of grade. *Stritesky v. City of Cedar Rapids (Iowa)*, 585.
- Liability for injury to child on electric railway track. *Fleishman v. Neversink Mountain R. Co. (Pa.)*, 261.
- Liability of railroad company where privileges granted by statute are made the occasion of unlawfully injuring abutting owners. *State v. Trenton Pass. Ry. Co. (N. J.)*, 392.
- Mortgage covering proposed extension of road. *Hinchman v. Point Defiance R. Co. (Wash.)*, 265.
- Municipal consent to location of track void if it does not define position of track in street. *West Jersey Traction Co. v. Camden Horse R. Co. (N. J.)*, 520.
- Negligence at crossing. *Consolidated Traction Co. v. Scott (N. J.)*, 372.
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- Occupancy of another track. *Crescent City R. Co. v. New Orleans & C. R. Co. (La.)*, 402.
- Occupancy of track by another company. *Crescent City R. Co. v. New Orleans & C. R. Co. (La.)*, 411.
- Ordinance in respect to speed of train. *Hall v. Ogden City St. Ry. Co. (Utah)*, 77.
- Ordinance regulating right of way at street car crossings. *Connor v. Election Traction Co. (Pa.)*, 263.
- Overcrowding street cars is negligence where the overcrowding causes the employees to lose control of the car. *Richmond R., etc., Co. v. Garthright (Va.)*, 257.
- Paramount right of street railway company to use of street. *Potter v. Scranton Traction Co. (Pa.)*, 307.
- Passenger riding on front platform of street car. *Mann v. Philadelphia Traction Co. (Pa.)*, 260.
- Plaintiff emerged from an alleyway, driving his team into an open street upon which defendant ran its car. Immediately after leaving the alley he looked in the direction from which the car came, and, in consequence of trees and poles, saw none, and then approached the track. Before crossing it he made no particular effort to see whether a car was coming, and it was possible that the poles might have obstructed the view between him and the car. The car was running at the rate of 25 or 30 miles an hour, and no gong was sounded until just before the collision occurred, in which plaintiff was injured. *Held*, that a nonsuit was improperly granted. *Hall v. Ogden City St. Ry. Co. (Utah)*, 77.
- Respective rights of the public and street railway companies at intersecting streets. *Richmond R., etc., Co. v. Garthright (Va.)*, 263.
- Rights of street railway company in public street. *Hall v. Ogden City St. Ry. Co. (Utah)*, 77.
- Rule as to right of way where street car meets person or vehicle. *Hall v. Ogden City St. Ry. Co. (Utah)*, 77.
- Running street car at excessive rate of speed. *Harper v. Philadelphia Traction Co. (Pa.)*, 257.
- Specific performance of contract to supply electric power to street railroad. *Electric Lighting Co. v. Mobile, etc., R. Co. (Ala.)*, 265.

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Stations. Meaning of the term. *Wilson v. Duluth Street R. Co. (Minn.)*, 53.

Street railway company not liable for negligence of independent contractor. *Sanford v. Pawtucket Street Ry. Co. (R. I.)*, 318.

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View that the question of negligence is one of fact, 254.

Where a railroad company has acquired a permanent easement in the streets of a city by an ordinance, it is not entitled to compensation from a street railroad as a condition to the crossing of its tracks by the latter. *Chicago, B. & Q. R. Co. v. Beatrice Rapid Transit & Power Co., (Neb.)*, 325.

Where the injured party was negligent in the first instance, such negligence will not defeat his action if it be shown that the defendant might have avoided the injury by the exercise of ordinary care and reasonable prudence. *Hall v. Ogden City St. Ry. Co. (Utah)*, 78.

Where the testimony tended to show that the electric car of defendant was run at the rate of about 20 miles an hour at the time of the accident, much faster than was allowable under the city ordinances, and that no gong was sounded and no bell rung, and it was quite possible that, had the car been run at its usual legal rate of speed and the bell rung and gong sounded, as should have been done, the accident would not have happened, and where it was also quite possible that, had the plaintiff observed that degree of ordinary care and caution which would be expected of an ordinarily prudent man under like circumstances, the accident would not have happened, still the court held that it was for the jury to pass upon the testimony, and determine from it the question of the negligence of the street car company, under the circumstances of this case, and it was error for the trial court to grant a motion for a nonsuit. *Dederichs v. Salt Lake City R. Co. (Utah)*, 258.

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Credibility of witnesses for the jury. *Fremont, E. & M. V. R. Co. v. French* (Neb.), 365.

WORDS AND PHRASES.

Equally. Instruction that plaintiff will be entitled to recover unless she, by her own negligence, contributed equally with defendant. *Gulf, C. & S. F. R. Co. v. Warlick* (Ind. Ter.), 82.





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